

IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA

DAVID HARRIS, CHRISTINE )  
BOWSER, and SAMUEL LOVE, ) Greensboro, North Carolina  
 ) October 15, 2015  
Plaintiff, ) 9:01 a.m.  
 )  
vs. )  
 )  
PATRICK MCCRORY, in his )  
capacity as Governor of North ) Case No. 1:13CV949  
Carolina, NORTH CAROLINA STATE )  
BOARD OF ELECTIONS, and JOSHUA )  
HOWARD, in his capacity as )  
Chairman of the North Carolina )  
State Board of Elections, )  
 )  
Defendants. )

TRANSCRIPT OF BENCH TRIAL VOLUME III OF III HELD BEFORE  
THE HON. **WILLIAM L. OSTEEN, JR.**, UNITED STATES DISTRICT JUDGE  
THE HON. **MAX O. COGBURN, JR.**, UNITED STATES DISTRICT JUDGE  
THE HON. **ROGER L. GREGORY**, UNITED STATES DISTRICT JUDGE

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24 Proceedings reported by stenotype reporter.  
25 Transcript produced by Computer-Aided Transcription.

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P R O C E E D I N G S

(At 9:01 a.m., proceedings commenced.)

THE COURT: All right. Good morning. Let me ask, we have a plaintiff's memorandum in support of Exhibit 13.

Mr. Farr, do you all know at this point about -- isn't that the email? Do you all know at this point whether or not it's been previously disclosed.

MR. FARR: Yes, Your Honor, and I would like to address that if I could.

THE COURT: Just briefly right now. We'll get on with the evidence, but I just want to know what the status of that part was --

MR. FARR: Very briefly, Your Honor.

THE COURT: -- if you know.

MR. FARR: Very briefly, I will say that we have the deposition transcript. I noted an objection to the document being privileged, and we've confirmed that the state rule under 26, I think it must be -- I get all these numbers confused, anyway, it's under Rule 26, Your Honor. There's a federal rule under 26 that deals with inadvertent disclosures, and the state rule under 26 is nearly identical, and what the state rule says is once an objection is noted, the other side has an obligation to return the exhibit to the party making the objection, and they are not allowed to disclose the exhibit until there's a ruling on whether or not the privilege is appropriate.

1           There's another federal rule, I think it's 502(b),  
2 which basically says that a waiver in a federal action will not  
3 be considered a waiver -- a disclosure in a state court action  
4 will not be considered a waiver if it would not be considered a  
5 waiver under the Federal Rule 26. So while they may have  
6 evidence that this document was filed, they had an obligation  
7 to return the document to us once we asserted the privilege,  
8 and there should've been a ruling on whether the document was  
9 privileged or not before it could be filed.

10           THE COURT: Okay. All right. So -- yes, sir?  
11 Briefly.

12           MR. HAMILTON: Just briefly, Your Honor, and we  
13 submitted a short brief on this simply to provide the Court  
14 with a factual record so you weren't taking counsel's word for  
15 it. The brief was filed not by us, but by defendants in the  
16 North Carolina Supreme Court and in this Court.

17           THE COURT: Let me say this: I can't speak for the  
18 other judges, but I haven't had an opportunity to review your  
19 brief. I was just handed the brief as we walked in this  
20 morning.

21           MR. HAMILTON: Understood.

22           THE COURT: So all I want to do at this point,  
23 yesterday there was a question about whether it had been filed,  
24 and Mr. Farr acknowledged that if it had been disclosed and  
25 filed and no objection, then privilege had been waived. As I

1 understand it now, the contention simply is that it was  
2 disclosed during the deposition, there was an objection, and no  
3 further action has been taken. So the issue before the Court  
4 is whether there was an inadvertent disclosure of sufficient --  
5 I guess you'd say that nonetheless was insufficient to preclude  
6 the Court from finding waivers. So the next step for us is to  
7 look at your memo, I think, and see what the history was so we  
8 can figure out what's going on.

9 MR. HAMILTON: I think that's right, Your Honor, and  
10 I think the question for the Court is, and I don't disagree  
11 that there was an objection made on the record in the  
12 deposition when it was produced as an exhibit by us, because it  
13 had been previously produced by counsel, but thereafter counsel  
14 slept on his or her rights. I mean, there was no issue raised  
15 in the state trial court, no correspondence back and forth give  
16 us the document back or anything like that, and then  
17 subsequently they, not us, they filed it in several public  
18 court filings, where it sits today, and any member of the  
19 public can come and look at that document.

20 THE COURT: I'll take a look at -- we'll take a look  
21 at your motion and see what we come up with.

22 MR. HAMILTON: Thank you, Your Honor.

23 THE COURT: Take that matter under advisement. All  
24 right. I have a mystery that I'm going to get resolved this  
25 morning before Dr. Hofeller resumes his testimony because this

1 mystery is interfering with my ability to consider the  
2 evidence, and that's the correct pronunciation of  
3 Dr. Ansolabehere's name. Doctor, the B-E-H-E-R-E part, is that  
4 one syllable like "bear" or is it two syllables like "be-ere."

5 DR. ANSOLABEHERE: "Be-here."

6 THE COURT: "Be-here." Thank you, sir. I'll be able  
7 to rest easily now.

8 All right. Mr. Farr, are you ready to resume with  
9 your evidence?

10 MR. FARR: Yes, sir.

11 THE COURT: You may.

12 MR. FARR: We'll have Dr. Hofeller return to the  
13 witness stand.

14 THE COURT: Dr. Hofeller, let me say that I know you  
15 understand this, but any time we go through an overnight recess  
16 and a witness returns to the stand, I do remind them that they  
17 are still under oath in this proceeding. You may take the  
18 witness stand.

19 THE WITNESS: Thank you, Your Honor. I understand.

20 THOMAS BROOKS HOFELLER,

21 DEFENDANT'S WITNESS, PREVIOUSLY SWORN

22 DIRECT EXAMINATION (Cont'd)

23 BY MR. FARR:

24 Q So Dr. Hofeller, I want to follow up with a statement you  
25 made yesterday, and this -- I'm asking you this question as a

1 fact witness, not as an expert witness. You testified that  
2 when you decided to use the Obama/McCain race that it linked up  
3 with other races. Do you remember that?

4 A I do.

5 Q Can you explain to the Court what you meant by that.

6 A What I meant by that is that the other races, major races,  
7 correlate very strongly with the Obama race. So the  
8 presidential race and the gubernatorial races in the Senate --

9 MR. HAMILTON: Objection, Your Honor, this is not  
10 contained in his expert report. There's no disclosure of any  
11 analysis about correlation or analysis of other elections, and  
12 I object. I'm sorry to object on the very first question this  
13 morning. It's not my intention. It's the same issue we had  
14 yesterday with the series of exhibits.

15 THE COURT: Same issue in terms of not disclosing the  
16 expert reports?

17 MR. HAMILTON: Right, the expert -- the two expert --  
18 the Court will recall this case has been delayed considerably  
19 by the *Alabama* case. The original report filed by  
20 Dr. Ansolabehere was from December, late December 2013. His  
21 reply was filed on January 29, 2014. This Court issued an  
22 order in May of this year authorizing the filing of  
23 supplemental reports in case something had happened in the last  
24 year.

25 It's an order dated May 7, 2015, saying, "It's



1 further ordered that plaintiffs and defendants shall file any  
2 supplemental expert reports by June 1, 2015." Neither side  
3 did, and so we object to Dr. Hofeller now talking about  
4 correlations with other elections that were never disclosed  
5 before. We haven't had an opportunity to respond to that.

6 I mean, that is -- I don't presume to know the  
7 Court's thinking, but I assume that's the whole point of this  
8 disclosure is so that we don't have this sort of Monday morning  
9 surprise and instead we have an orderly process where the  
10 experts disclose their opinions and the analysis reaching their  
11 opinions, and the other side has an opportunity -- a fair  
12 opportunity to respond to it. That's obviously not happening  
13 here.

14 THE COURT: All right. Just a moment before we  
15 proceed any further.

16 (Off-the-record discussion.)

17 THE COURT: All right. Mr. Farr, let me hear from  
18 you on what you think your immediate response to this. Is  
19 there anything you can point us to that might cover this  
20 information?

21 MR. FARR: Well, Your Honor, the Court might have a  
22 better memory of this than I have, but I recall  
23 Dr. Ansolabehere testifying about correlations he made to other  
24 elections, and I don't recall any of those -- any of that  
25 testimony being in his report. He was testifying as an expert

1 witness.

2 Dr. Hofeller, in this part of his testimony, is  
3 testifying as the map drawer, so this really is not part of his  
4 expert report. It's part of his memory of the facts of what  
5 went into drawing the maps, and in any case, assuming he had  
6 some obligation to disclose this in an expert report, which we  
7 don't think he did, Dr. Ansolabehere did not disclose in his  
8 reports, as far as I understand them, and I stand to be  
9 corrected, that he had done correlations on other races.

10 So I think that the door was open on that issue, even  
11 from an expert witness perspective, but that's not really what  
12 he's testifying on here. He's testifying as a fact witness  
13 about how he drew the maps. And they had a chance to depose  
14 him and they had a chance to ask him all the questions that  
15 they wanted to ask him about what information he relied upon or  
16 what things he looked at or did when he was drawing the maps.

17 THE COURT: Let's see.

18 MR. HAMILTON: Your Honor, may I respond?

19 THE COURT: Give me just a minute. I want to sort  
20 through. So the -- we have from Dr. Hofeller a second expert  
21 report and an expert report. Those are the two reports from  
22 Dr. Hofeller?

23 MR. FARR: Yes, Your Honor.

24 THE COURT: Is there anything in those -- I mean, I  
25 think from the analysis presented, I don't think there's any

1 surprise that he relied on the Obama vote election results as  
2 set forth in Table 3. Is there anything you can point us to in  
3 the reports that would suggest how he did that specifically  
4 with reference to I think it's D124 -- is that it? Which one  
5 were we looking at yesterday when we stopped? Yeah, D124 which  
6 has got the '08, '10, and '12 general election returns. Do you  
7 understand my question?

8 MR. FARR: Well -- yes, Your Honor. I think it's a  
9 little bit of a different issue. The Exhibit D124 is actually  
10 reporting election results. Dr. Hofeller would testify that he  
11 did a correlation while he was drawing the maps of other high  
12 profile state-wide elections to validate his view that the  
13 Obama election would be an appropriate election used to draw  
14 the maps. So that's a little bit of a different question.

15 He did not disclose in his expert reports that while  
16 he was drawing the map he performed those correlations, but  
17 that part of his testimony is what he did in drawing the maps,  
18 and the plaintiffs had every opportunity to depose him. They  
19 deposed him twice, in fact, and they could have asked him, for  
20 example, what did you do to validate your decision to use the  
21 Obama election, and they did not do that as far as I know. So  
22 this, again, is a factual issue, not an expert issue.

23 And again, Your Honor, he has testified already that  
24 he took steps to prove that the Obama election lined up with  
25 other state-wide reports. That's already in evidence. This is

1 just explaining what he did to reach that conclusion.

2 THE COURT: Mr. Hamilton?

3 MR. HAMILTON: Well, I've got several responses to  
4 that. First of all --

5 THE COURT: Just make them brief. I'm trying to  
6 figure out where we are at this point.

7 MR. HAMILTON: Sure. First, Dr. Ansolabehere  
8 certainly did discuss correlations. It was in his expert  
9 report dated January 29, 2014, a year and a half ago. It --  
10 specifically paragraph 31, and he gives the exact correlation  
11 to the Obama vote, of course, but also the governor's race in  
12 2008 at .90 and the Senate race in 2008. Those are the three  
13 races that we've been talking about. So this isn't -- this  
14 is -- no parallel here. It was disclosed.

15 Second, in Dr. Hofeller's deposition transcript, he  
16 was actually asked:

17 "Did you use the Obama 2008 election results in  
18 drawing Congressional 1?

19 Answer, to some extent.

20 Question, did you use any other election results in  
21 drawing Congressional 1?

22 Answer, there were none others on the screen."

23 So he was asked. He didn't answer that question and  
24 say, oh, yeah I did the correlations for these other races.  
25 This -- this is -- this is new expert testimony.

1           And then the last point I'll make is we're not  
2 operating on a clean slate. This Court, of course, set out its  
3 own disclosure rules, but Rule 26 --

4           THE COURT: I'm familiar with the disclosure rules,  
5 Mr. Farr, in terms of none others -- no others on the screen,  
6 how to interpret that response.

7           MR. FARR: Well, first of all, Your Honor, let me  
8 apologize to counsel and the Court about my incorrect statement  
9 that Dr. Ansolabehere did not include that in his report. I  
10 deeply apologize for that.

11           If you look at the question, the question was what  
12 were you looking at on the screen when he was drawing the map.  
13 That's different -- that's a different question than did you do  
14 anything else to validate your decision to use the Obama plan;  
15 and, at best, they can use that question to impeach his  
16 testimony. But, again, this is not expert testimony he's  
17 giving here. This is his recollection of what he looked at and  
18 what he did to validate the Obama race.

19           THE COURT: All right. Let me say this: I'm just  
20 going to -- I'm speaking for myself. I want to talk to the  
21 other judges in just a second, but this is a problem we run  
22 into sometimes when a witness is both a fact expert and a -- a  
23 fact witness and an expert witness, and dividing the line as to  
24 what is factual testimony as opposed to expert witness  
25 testimony can be kind of tricky.

1           Confronted with this in the past, I've actually had a  
2 witness take the box, testify as a fact witness, come down and  
3 then come back and offer the opinions as an expert. I  
4 understand that doesn't make any sense here, but it's a knotty  
5 little issue sometimes.

6           So at this point I think we're going to have to in  
7 addition to considering the reports, and take a look at the  
8 reports, we're going to have to see at least parts of that  
9 deposition testimony if we're going to be called upon to make  
10 some finding as to whether or not the response -- I don't mean  
11 to suggest it was a false response, but whether or not the  
12 response was sufficient to require the evidence be excluded or  
13 whether the response should have been -- or whether the  
14 response should have been followed up with more pointed  
15 questions. That's a difficult issue. Let me talk to these  
16 judges.

17           MR. HAMILTON: Your Honor?

18           THE COURT: Yes, sir.

19           MR. HAMILTON: May I -- there's an additional  
20 passage.

21           (Off-the-record discussion.)

22           MR. HAMILTON: Thank you, Your Honor. I failed to  
23 draw to the Court's attention I wasn't actually at the  
24 deposition, so -- but it's on the same page, page 22 of the  
25 September 9, 2015, deposition.

1           "Question, the only election results you utilized in  
2 drawing Congressional 12 were the 2008 Obama election results?

3           Answer, that's correct."

4           So there was a followup question. It was  
5 specifically designed to get at this information.

6           THE COURT: Well, still, I think we have to look at  
7 it in context because those may have been the ones he used, but  
8 there is an additional question of did you look at anything  
9 else and reject it? Should you have asked that in light of the  
10 reports? That's the question. Let me talk to these judges  
11 just a moment.

12           (Off-the-record discussion.)

13           THE COURT: All right. We're going to take the  
14 evidence subject to the objection. At this point in time,  
15 I'm -- we're just taking the matter under advisement. I would  
16 like to get -- you'll have to make a call on whether or not  
17 it's a lengthy portion of the deposition, enough for me to make  
18 a determination as to what the context of those questions were  
19 or whether you just want to do the whole thing. I don't know  
20 the answer to that, but at some point I'm probably going to  
21 want to take a look at that, but I am concerned about the fact  
22 that this didn't show up in the expert report, at least  
23 sufficiently to, but we'll see where we get.

24           MR. HAMILTON: Thank you, Your Honor. I appreciate  
25 that, and at the break we'll hand up the copies of the

1 deposition which I have with me here in court. May I have a  
2 continuing objection, so I don't have to keep jumping up.

3 THE COURT: Oh, yeah, we'll note --

4 MR. HAMILTON: Thank you.

5 THE COURT: To make it clear for the record, the  
6 continuing objection relates to Dr. Hofeller's opinion or his  
7 explanation based on charts or other as to why -- A, why he  
8 rejected elections other than the Obama 2008 race as the basis  
9 for map drawing and his opinions as rendered in this case as  
10 further explained by the chart, this Defendant's Exhibit 124.

11 MR. HAMILTON: Thank you so much, Your Honor.

12 THE COURT: All right. You may continue, Mr. Farr.

13 MR. FARR: Thank you, Your Honor.

14 BY MR. FARR:

15 Q So Dr. Hofeller, starting up again. Yesterday you  
16 testified that you performed an analysis showing that the Obama  
17 race linked up with other races as far as revealing Democratic  
18 voting strength?

19 A Yes.

20 Q And can you tell the Court what you did.

21 A Well, there are actually two issues involved here. The  
22 first issue is when the database was being prepared, there was  
23 a question about which election contests should go into the  
24 database. There were a lot more election contests that were  
25 available to be put into the state's database, and I was asked



1 my opinion, as were many other people, and one of the things I  
2 did was to look at how these different elections track one  
3 another.

4           The other thing I might add, too, is that I didn't  
5 draw this plan in a vacuum as far as the data was concerned.  
6 First of all, I've drawn numerous plans in the state of North  
7 Carolina over decades. I drew the State Senate districts and  
8 the State House districts, and I know from that experience that  
9 the underlying political nature of the precincts in the state  
10 does not change no matter what race you use to analyze it.

11           The only way the underlying political demographics,  
12 if you could use that term, change in a precinct is if the  
13 precinct is changed in the nature of the people that are living  
14 in the precinct. So once a precinct is found to be a strong  
15 Democratic precinct, it's probably going to act as a strong  
16 Democratic precinct in every subsequent election. The same  
17 would be true for Republican precincts.

18           So if you used a conglomeration of elections, my  
19 experience is you'd come up with the same -- the same result.  
20 You may find a little higher score for the Democrats overall in  
21 one election because the candidate did better, or you might  
22 find a lower one, but the general ranking of the precincts as  
23 to how Republican or how Democratic they are is simply not  
24 going to change.

25 Q     All right. Now, and to clarify again, when you were

1 drawing the map, actually drawing the 12th District, what race  
2 did you look at? What election contest did you look at?

3 A On the screen when I was drawing the map was the  
4 Obama/McCain race shaded in accordance with the two-party vote,  
5 which excluded the minor party candidates, and that was the  
6 sole thematic display or numeric display on the screen except  
7 for one other thing, and that was the population of the  
8 precinct because of one person, one vote. And if, in those few  
9 instances where the precinct was broken down because of one  
10 person, one vote or some other factor, you also have displayed  
11 the populations of the individual box.

12 Q Okay. Now, Dr. Hofeller, could you -- there's a white  
13 notebook up there that has Dr. Ansolabehere's reports.

14 THE COURT: All right. Just to be clear, we're  
15 moving off of the objection to material at this point?

16 MR. FARR: Yes, sir, Your Honor. I'm done with that.

17 THE COURT: All right.

18 MR. HAMILTON: Thank you, Your Honor.

19 BY MR. FARR:

20 Q Could you turn to Plaintiff's Exhibit 17 in that notebook,  
21 which is Dr. Ansolabehere's report of I think December 23,  
22 2013? And I want you to turn to Table 1 which is on page 22.  
23 Are you there?

24 A Yes.

25 Q Now, Dr. Ansolabehere has got two different compactness

1 tests listed on this table. I don't want to ask you about the  
2 Reock test, okay. I want to ask you about the test that he  
3 describes as ratio of area to perimeter of district. Do you  
4 see that?

5 A I do.

6 Q Do you have any opinions about this test as it's reflected  
7 in this chart?

8 A I do.

9 Q Would you explain them to the Court?

10 A Yes. As I thought I heard yesterday, and as I read in  
11 Dr. Ansolabehere's testimony, that this is a ratio of the  
12 perimeter miles of the district to the square miles of the  
13 district, which means in order to get the test result you have  
14 to divide the perimeter miles into the square miles, and it  
15 will yield actually a smaller amount in square miles.

16 The problem that I have with this page is that the  
17 results for both the 2001-2011, which is the 2001 enacted plan,  
18 zero deviation, and the Rucho-Lewis, add up to more than the  
19 square miles of the state's land area in square miles. There  
20 are 53,000 square miles approximately in the state, and if you  
21 add up these numbers, they come out much higher. If you've  
22 divided the perimeter miles into the square miles, it should be  
23 much lower, and actually what it turns out to be are numbers  
24 like 6.2 or 4.5 or something like that. So I simply took  
25 another look at this, and I said, this doesn't make sense to

1 me. I have no quarrel whatsoever with his Reock scores.

2 Q Thank you, Dr. Hofeller. That's all the questions I have  
3 on that.

4 You have in front of you Defendant's Exhibit 124,  
5 which we started talking about yesterday.

6 THE COURT: I got it. This is part of the objected  
7 to material?

8 MR. HAMILTON: Thank you, Your Honor. You took the  
9 words right out of my mouth.

10 BY MR. FARR:

11 Q All right. Dr. Hofeller, can you tell the Court, did you  
12 prepare this?

13 A I'm sorry, it's D124?

14 Q Yes.

15 A Yes.

16 Q And could you tell the Court what this is.

17 A This is a comparison of the change in black voting-age  
18 population, adult voting-age population, which we call black  
19 VAP and total black VAP, which is also called by the Census  
20 Bureau plus 18 any part black voting-age population, which is a  
21 longer title -- probably that's why this is often used --  
22 between the 2011 enacted plan and the 2001 enacted plan, and  
23 you can see the differences on the third line.

24 This also compares a number of percentages for --  
25 well, for several elections over time in the new and old plan.

1 These figures, incidentally, are in another -- another exhibit  
2 that's already in the record here, and what it shows is that  
3 when the 2011 plan was redrawn from the 2001 plan, the  
4 African-American demographics went up at a lower rate than the  
5 gain in the Democrats' election contest demographics.

6 Q All right. Dr. Hofeller, how did you create this exhibit?

7 A Specifically?

8 Q Yeah, what did you -- how did you create it?

9 A I actually looked at -- at the time I created it, I looked  
10 at the figures in Maptitude.

11 Q And what were the figures in Maptitude that you were using  
12 and where did they come from?

13 A They came from the North Carolina redistricting database  
14 which was done by the IT group in the state legislature.

15 Q Okay. And I want to make sure that the Court understands  
16 one point. Do you have your first report which is Defendant's  
17 Exhibit D-26.1? It should be up there.

18 A That would be my second expert report?

19 Q The second report, yes.

20 A Okay. Yes, I do.

21 Q Could you turn to Map 3. And this is the map we went over  
22 yesterday that reported the percentage of the Obama vote in the  
23 2003 Congressional districts. Do you remember that?

24 A I'm sorry?

25 Q Do you remember going over this map yesterday?

1 A Yes, we went over this map in conjunction with Map 2. Are  
2 we on Map 2 or Map 3?

3 Q Map 3.

4 A Okay.

5 Q And what I want you to explain to the Court, I'm looking  
6 at Map 3, and you're reporting that the Obama vote in the 2011  
7 1st District was 70.58 percent, and on Exhibit 124 you're  
8 reporting it slightly higher at 70.93 percent. Could you  
9 explain that -- why that's different.

10 A Again, it's two-party vote, and straight --

11 Q Which one is a two-party vote?

12 A Well, they're minority candidates that get --

13 Q No, no, which exhibit -- is Map 3 the two-party vote or is  
14 Exhibit 124 the two-party vote?

15 A I'm sorry, I have to look at --

16 Q Okay.

17 A Exhibit 124 is definitely two-party vote, yes.

18 Q And so could you explain to the Court why the Obama  
19 percentage is higher -- slightly higher in Exhibit 124?

20 A Well, that's if you use two-party votes, the percentages  
21 for both candidates will go up.

22 Q And what's not included in the two-party vote?

23 A Third parties.

24 Q Okay. That's all I have on that, Your Honor.

25 A Could I add something to that?

1 MR. HAMILTON: Well, we would object, Your Honor.

2 The normal process is a question and then an answer.

3 THE COURT: Yeah. Is further explanation necessary  
4 to respond to the question?

5 THE WITNESS: I just wanted to add, Your Honor, that  
6 the two --

7 THE COURT: All right. Answer my question first.

8 THE WITNESS: I think it's --

9 THE COURT: Is what you want to add necessary to your  
10 explanation?

11 THE WITNESS: I feel it is, Your Honor.

12 THE COURT: You can explain your answer. We won't  
13 cut you off from that.

14 THE WITNESS: Thank you, Your Honor. The scores I  
15 used were identical, the data I used were identical for both  
16 maps, so it shows the difference between the maps and the  
17 importance of these two exhibits. Map 2 and Map 3 is to show  
18 how the partisan nature of the 13 districts changed between the  
19 two plans.

20 THE COURT: All right. Next question, Mr. Farr.

21 MR. FARR: Yes, Your Honor. I'm going to hand an  
22 exhibit up to the witness, Your Honor.

23 THE COURT: All right. Mr. Hamilton, to be -- while  
24 he's doing that, to be clear, on Defendant's Exhibit 124, with  
25 respect to the testified to material, I'm assuming, I'm trying

1 to clarify, in that first spreadsheet at the top, with respect  
2 to the Congressional Plan, the 2010 Census, and the census  
3 information and the 2008 general election returns as relate to  
4 the Obama vote and the Obama percentage -- or maybe the whole  
5 chart. Is there an objection to that information?

6 MR. HAMILTON: Well, yes, is the direct answer. The  
7 two-party vote explanation here, there's nothing in his expert  
8 reports about that at all. I mean, he didn't discuss that in  
9 his deposition, so that part of that chart. The data --

10 THE COURT: All right. Hold on just a second. Let  
11 me clarify. There would also be an objection under the  
12 Congressional Plan to the -- at least the Romney vote and the  
13 two-party vote and the other information in the two charts  
14 below.

15 MR. HAMILTON: Correct, the two charts below,  
16 absolutely.

17 THE COURT: Okay. All right. That's enough for now.  
18 You may continue, Mr. Farr.

19 MR. FARR: All right.

20 BY MR. FARR:

21 Q Dr. Hofeller, I've handed you Defendant's Exhibit 115. Do  
22 you have that in front of you?

23 A Yes, I do.

24 Q And is this something you prepared?

25 A I did.



1 Q And could you tell the Court what this is.

2 A This is essentially the top table in the Exhibit D124 and  
3 has the same figures in it that that exhibit did, which is a  
4 comparison of the increase in census demographics between the  
5 2001 enacted plan and the 2011 enacted plan and the same  
6 increase for the Obama percentage in between the plans.

7 So what it says is while the -- for example, while  
8 the total black VAP went up 4.02 percentage points, the Obama  
9 percent went up 7.85 percentage points.

10 Q Okay. And if we went back to Maps 2 and 3 in your second  
11 report, I think we'd find that the increase in the Obama  
12 percentage is slightly higher. Can you explain to the Court  
13 why that's so.

14 A I haven't done the math in my head, but it's really a  
15 similar increase.

16 Q But is this -- is this the two-party analysis again in  
17 this exhibit?

18 A Yes, that's -- that's what the exhibit states.

19 Q Okay. That's all I have on that, Your Honor.

20 THE COURT: All right.

21 BY MR. FARR:

22 Q Now, Dr. Hofeller, I want you to turn to your second  
23 report which is Exhibit 26.1.

24 THE COURT: Again, to clarify for the record, we're  
25 moving off the objected to material now?

1 MR. FARR: Yes, sir, Your Honor, and I didn't -- I  
2 didn't hear an objection to the exhibit we just --

3 THE COURT: All of the objection is related to the  
4 continuing exhibit, so we'll figure out how it all fits  
5 together. You can continue.

6 MR. FARR: I would just point out, Your Honor, the  
7 last exhibit that Dr. Hofeller testified to was on our exhibit  
8 list and was not objected to.

9 THE COURT: Okay.

10 MR. HAMILTON: Just for the record, that's  
11 Exhibit D115.

12 THE COURT: So no objection to 115?

13 MR. HAMILTON: We have no objection to 115.

14 THE COURT: Okay. Thank you. All right.

15 BY MR. FARR:

16 Q So Dr. Hofeller, do you have your pointer with you up  
17 there?

18 A Yes, I do.

19 Q Okay. If you decide it's helpful to use that, you may.  
20 That's going to be up to you, but I want to turn to -- I want  
21 to ask you about District 12, how to figure in Greensboro under  
22 the '97 Plan, the 2001 Plan and the 2011 Plan. Okay. So could  
23 you turn, please, to Map 4 in Exhibit 26.1 and tell the Court  
24 what that is.

25 A Map 4?

1 Q Yes, sir.

2 A Map 4 is an enlargement of the central portion of the  
3 state showing the boundaries of the 12 Congressional Districts  
4 enacted in 1997.

5 Q And what color on that map is the '97 12th Congressional  
6 District?

7 A It's blue.

8 Q And could you, just for the record, state what counties it  
9 was located in.

10 A It starts out in Mecklenburg County in the south,  
11 continues through a corridor in Iredell County, heads east over  
12 into Rowan County and then northeast through Davidson County,  
13 and then it branches off taking a portion of Forsyth County and  
14 Guilford, so it's six counties.

15 Q Okay. And now turn to Map 5, and could you tell the Court  
16 what that is.

17 A Map 5 is an enlargement of the central portion of the  
18 state again showing the boundaries of the 13 -- now 13  
19 districts which were drawn in 2001 as the enacted 2001 map.

20 Q And so what counties are -- are -- is the 12th District  
21 located in under the 2001 Plan?

22 A Once again, the 12th District in blue starts out in  
23 Mecklenburg County, and instead of going through Iredell  
24 County, it goes through Cabarrus County into Rowan County and  
25 up through Davidson County and then again branches off into

1 Forsyth County and Guilford County.

2 Q Now, did the 2001 Plan have all the same areas of Guilford  
3 County as the '97 Plan?

4 A No.

5 Q And how did that change?

6 A Well, the strong Democratic areas of Guilford County were  
7 split in this map and part of them were put into the  
8 13th District. I might add through a noncontiguous, what would  
9 be considered now a noncontiguous pathway, the 13th coming down  
10 into Guilford County and bisecting the 6th district at a single  
11 point of contiguity. So strength was essentially borrowed, if  
12 you might say, from the 20 -- the 1997 map to help form the new  
13 13th District.

14 Q When you say "strength," what do you mean?

15 A Democratic voting strength.

16 Q Okay.

17 A Precincts that had strong Democratic voting  
18 characteristics.

19 Q And what happened to them?

20 A They went into the 13th.

21 Q Okay. All right. Turn to Map 6. Could you tell the  
22 Court what that is.

23 A This is a map, again, of the central portion of the state  
24 showing the 13 districts in the enacted 2011 map.

25 Q And what color's the 12th District?

1 A The 12th District is now red. The computer does the  
2 coloring to make sure that no adjacent districts have the same  
3 color in this.

4 Q All right. And what counties was the 2011 Congressional  
5 District included in?

6 A It's the same counties that it was included in in the 2001  
7 enacted plan. Do you want me to go through them?

8 Q We've done that, so I think that will be sufficient. And  
9 what changes were made in Guilford County in the 2011 plan as  
10 compared to the 2001 Plan?

11 A The 2011 -- I'm sorry, as compared to the 2001 Plan, the  
12 part of the 2011 map in Guilford County has portions of the  
13 former 1997 12th District in Guilford County added into it, so  
14 it's more modeled after that, although there are some  
15 differences.

16 Q And is the 13th District in the 2011 plan located in  
17 Guilford County?

18 A No. It's located I guess the nearest it comes to Guilford  
19 County sort of a tie between Durham County and Wake County, but  
20 it's nowhere near Guilford County on the new map.

21 Q All right. Could you explain to the Court what Map 7 is.

22 A Map 7 is a map of the 2001 enacted plan's 13th  
23 Congressional District colored in green and also demonstrates  
24 the boundary of the 12th District in red.

25 Q And that's the 12th District in Greensboro, in Guilford

1 County?

2 A A portion in Guilford County, yes.

3 Q Okay. And could you explain to the Court what map No. 8  
4 is.

5 A Map No. 8 shows the -- essentially the dividing up, the  
6 reconfiguration of the 13th and other districts in the 2000 --  
7 from the 2001 Plan so all of the colored areas on the map were  
8 in the 13th District as it was constituted in the 2001 Plan --

9 Q All right. And so --

10 A -- and it shows.

11 Q Go ahead.

12 A And it shows where they ended up in the 2011 map.

13 Q And can you tell the Court what the colors represent for  
14 the various districts.

15 A Yes. The portion of the old 13th that is in the new  
16 13th is in yellow, and it's located in Wake County and  
17 Granville County. The portion of the old or the 2001 13th that  
18 is now in the 6th in the present map, the 2011 map is colored  
19 blue, and it's in Northern Granville, Person, Caswell,  
20 Rockingham and Guilford County.

21 Q What does the green represent?

22 A The portion that's shaded green is the portion of the 2001  
23 13th that was added to the 2011 4th Congressional District.

24 Q And then what's the red or pink portion in Guilford  
25 County?

1 A That's the portion of the 2001 13th which was added to the  
2 2011 12th District.

3 Q All right.

4 A There's one more.

5 Q Okay.

6 A Unfortunately, it's too small to see. There's just a very  
7 small portion in -- in the -- in Wake County that has the  
8 symbol N2 on it, which actually went into the new 2nd District.

9 Q All right. Thank you. Now, moving to Map 9, could you  
10 tell the Court what that is.

11 A Map 9 -- nine, I'm sorry, is a side-by-side view of the  
12 1997 enacted 12th, the 2001 enacted 12th, and the 2011 enacted  
13 12th shaded in red showing the counties and the shape of the  
14 district.

15 Q All right. Thank you. Could you now turn to Map 10 and  
16 tell the Court what this is.

17 A Map 10 is a comparison of the territories in the 2001 and  
18 2011 12th Congressional Districts, and it essentially  
19 demonstrates the movement of the 12th District between the two  
20 maps. So the green portion -- the shaded green portion of the  
21 map is what Dr. Ansolabehere would call the corollary, and I  
22 agree with that. It was the area that was in both the new and  
23 the old 12th.

24 The red area, the red area on the map that's shaded  
25 shows the portion of the 2001 12th that was not found in the

1 new 2011, so those were the areas that were removed from the  
2 12th. And the blue areas show -- the blue shading shows those  
3 areas which were added to the new 12th that weren't in the old  
4 12th. One notable thing about this map is -- that I feel is  
5 important is to note the movement of the corridor that runs  
6 between Forsyth, Guilford County and Mecklenburg. It was moved  
7 both to the southeast and also was smaller, and that's borne  
8 out by their exhibits that there's less population in that  
9 corridor. That was part of the effort, successful effort, I  
10 might add, to balance the populations of the districts all the  
11 way around the map.

12 Q All right. And now let's turn to Map 11. Could you tell  
13 the Court what that is.

14 A Map 11 is similar to Map 9 in that it shows the 1997, the  
15 2001, and the 2011 enacted maps, again shaded in red, but shows  
16 more detail in Guilford County.

17 Q All right. And then if we look at Maps 12, 13 and 14, are  
18 they just larger versions of each of the maps that are on Map  
19 11?

20 A Map 12 is just a more detailed view, a little better  
21 rendition of the VTD lines for the 1997 12th map; 13 is the  
22 same thing for the 2001 12th, and Map 14 is for the 2011  
23 portion.

24 Q Dr. Hofeller, can you explain to the Court how these three  
25 versions of the 12th District treated the strongly Democratic



1 areas that you talked about that exist up in the northeastern  
2 part of the Guilford County?

3 A Well, it would be easier perhaps if the politics were on  
4 the map, but essentially the Map 14 shows that the 2011 map is  
5 a little more -- I think significantly more aligned with the  
6 '97 map than it is with the 2001 map, particularly in  
7 Greensboro.

8 Q Okay. And then if you turn to map 15, what does that  
9 show?

10 A That is again a more detailed map of the northeast corner  
11 of Guilford County, actually central and northeast corner,  
12 showing how the 2001 13th dovetailed into the 2001 12th in the  
13 Greensboro area.

14 Q Okay. And so what are the green sections on Map 15?

15 A The green sections shaded green is the 2001 13th, and the  
16 red section is the 2001 12th.

17 Q So if we look at these maps, is it fair to say that the  
18 portions of the 2001 13th District were put back into the 2011  
19 12th District in northern -- northeastern Guilford County?

20 A I think what I'd say is that the -- when the 2011 map was  
21 drawn, particularly in Greensboro, the alignment was more in  
22 line with the '97 map than it was with the 2001 map, and  
23 perhaps the main thing about that was the 13th District, which  
24 was moved clear over to Wake County, was no longer on the map.  
25 The other district which was now in Guilford County was the

1 6th District, which is a Republican district, and in order to  
2 make that district more Republican, or actually keep it  
3 Republican, the strong Democratic areas of Greensboro had to be  
4 removed. So the portions of the 13th that were -- I'm sorry,  
5 portions of Greensboro that were in the 13th in the 2001 Plan  
6 were moved to the 12th.

7 Q All right. Thank you. Now, Dr. Hofeller, I want to ask  
8 you about Dr. Ansolabehere's envelope theory. Do you have an  
9 opinion on that?

10 A Yes.

11 Q Would you tell the Court what that is.

12 A Well, I think right off, my first impression when I saw  
13 the envelope theory was I had never heard that name before so  
14 it was a brand-new name to me, and I think I stated that.

15 The second thing that I felt when I saw it was that  
16 if you build a minority district in a group of counties and the  
17 part -- only part of some of the counties are in the minority  
18 district, that it's completely logical that the portions that  
19 are in the counties, of the counties that are in the minority  
20 district, which in this case would be District 1, would have a  
21 much higher number of minority residents or voters -- actually  
22 residents -- in them than the portion outside the district, and  
23 that it was, I guess, a very fancy way of stating the obvious,  
24 and I think the same would be true in the case of the 12th.

25 But the other thing that -- about the envelope is the

1 nature of the envelope in that Dr. Ansolabehere used the same  
2 envelope to look at the 2011 map and make his envelope analysis  
3 that he did for the '01 map, even though the envelopes were  
4 actually different, and that really biases the figures,  
5 particularly of what's outside the envelope, but it would bias  
6 all the percentages.

7 Q All right. Let's explore that a little bit. Let's --  
8 first of all, do you have Dr. Ansolabehere's second report  
9 which is Exhibit 18? It's in that white notebook.

10 A Exhibit 18?

11 Q Yes.

12 A Yes.

13 Q Okay. Would you turn to Table 2, which is the second to  
14 last page. Are you there?

15 A I'm sorry, I was on the wrong -- yes, Table 2.

16 Q And so in Table 2 Dr. Ansolabehere lists the voting-age  
17 population and registered voters for both the city of Durham  
18 and the county of Durham, does he not?

19 A Yes.

20 Q Now, Dr. Hofeller, if you're familiar with all the  
21 counties that were included in both the 2001 1st Congressional  
22 District and the 2011 1st Congressional District, you're  
23 familiar with the demographics of those counties, are you not?

24 A Yes, I'd say I am, yes.

25 Q And all the counties that were in either the 2011 or the

1 2001 1st District, which county do you think has the highest  
2 population?

3 A Oh, without a doubt it would be Durham County.

4 Q And which county would have the highest population of  
5 African-Americans as far as like total numbers?

6 A Again, I can't state it categorically because I'd have to  
7 have the numbers in front of me, but from my knowledge I would  
8 say it would be Durham County.

9 Q All right. So now let's turn back to Dr. Ansolabehere's  
10 first report which is Plaintiff's Exhibit 17.

11 A Yes.

12 Q And Table 7 and 8 are looking at the envelope for the 2001  
13 and the 2012 -- or 2011 12th District, are they not?

14 A Seven and eight are an analysis comparing the envelope to  
15 the 12th -- the new 12th Congressional District.

16 Q Right.

17 A Okay. The 12th Congressional District.

18 Q And the 12th Congressional District in the 2001 Plan is in  
19 the same county as the 2012 -- or 2011 12th District, correct?

20 A Yes.

21 Q And so they're both in the same counties and the total  
22 population in those counties, under the 2000 Census, would be  
23 the same for both the 2001 12th District and the 2012 District?

24 A Yes, it's like comparing apples to apples.

25 Q All right. Now, let's go to Tables 5 and 6. So these two

1 tables are purporting to compare the envelope for the 2001 1st  
2 District and the 2012 1st District, correct?

3 A That's correct.

4 Q And if you look at Table 5 and Table 6 under the column  
5 registered voters in group in the envelope, are those numbers  
6 the same?

7 A Yes.

8 Q Now, was the 1st Congressional District in 2001 in the  
9 same counties as the 2011 1st Congressional District?

10 A No.

11 Q And was Durham in the 2001 1st Congressional District?

12 A No.

13 Q But you heard Dr. Ansolabehere's testimony, and he  
14 included Durham County in the envelope that was used to analyze  
15 both the first and -- or the 2001 1st and the 2011 1st  
16 District, correct?

17 A Yes.

18 Q Okay. Dr. Ansolabehere didn't look at the envelope that  
19 was established by the counties that were actually included in  
20 the 2001 1st Congressional District?

21 A Okay. I'm sorry, could you ask that again? I'm trying  
22 to --

23 Q Did Dr. Ansolabehere establish an envelope under his  
24 envelope theory for the 2001 1st Congressional District based  
25 only on the counties that were actually in the 1st

1 Congressional District in 2001?

2 A No.

3 Q Now, he didn't disclose in his report, did he, that his  
4 envelope for the 2001 1st Congressional District included  
5 Durham County, did he?

6 A Not that I remember.

7 Q Okay. So including Durham County in the envelope he used  
8 to analyze the 1st Congressional District, would you agree that  
9 that would add a lot of black population into the envelope he  
10 was using to analyze the 2001 1st Congressional District that  
11 actually was not in the district?

12 A Well, actually it would add both black and white  
13 population to the area that was outside of the district,  
14 because none of Durham County was in the district, so it yields  
15 a result that is biased.

16 Q So let's explain to the Court, by adding Durham County to  
17 the envelope he used to analyze the 1st District, what impact  
18 did that have on both the number and percentage of black  
19 population that Dr. Ansolabehere said was outside of the  
20 envelope?

21 A Of course, the number would be changed greatly. The  
22 percentages might be less changed depending on how close the  
23 population of Durham is to the median there of the district,  
24 but it definitely would bias the results.

25 Of course, another problem with comparing the 2001

1 district to the 2011 district is, of course, the problem of the  
2 97,500 persons that had to be added to the new 2011 district.  
3 They had to go somewhere.

4 Q And would that have any sort of impact on his envelope  
5 analysis, the underpopulation in the 1st District?

6 A Well, it would certainly change the numbers on the charts.  
7 The -- his conclusions might be similar, but in comparing the  
8 two plans, they wouldn't be true and accurate.

9 MR. FARR: All right. Your Honor, I have an exhibit  
10 for the witness.

11 THE COURT: All right.

12 MR. FARR: It's on our exhibit list and it's not been  
13 objected to.

14 BY MR. FARR:

15 Q Dr. Hofeller, I've handed you Exhibit 114. Did you  
16 prepare this exhibit?

17 A I did.

18 Q And could you tell the Court what this is.

19 A This is a table which shows the percentages of total adult  
20 black population which would be TVAP, black TVAP for the areas  
21 inside of and outside of the districts for the 12th in various  
22 maps. The 2001 enacted plan, the 2011 SCSJ plan, the 2011 Fair  
23 and Legal plan, those two plans were the plans that were  
24 submitted as proposed maps by parties for the 2011  
25 Congressional redistricting, and then on the far right the 2011

1 enacted plan, and it shows those counties that were split. In  
2 any of those plans where you see the kind of dotted shading the  
3 county was not involved in a county split in that particular  
4 plan.

5 Q All right. I want to make sure the Court understands this  
6 exhibit, Dr. Hofeller. In the first column you have the word  
7 "county?"

8 A Yes.

9 Q What counties are listed under that column?

10 A Do you want me to read them all off?

11 Q No, no, I mean, why are they in the column?

12 A They're in the column because they were split in one of  
13 the four plans that I'm demonstrating by this exhibit.

14 Q Okay. And the four plans you looked at were the 2001 Plan  
15 and then the next plan was proposed by who?

16 A The Southern Coalition for Social Justice, SCSJ.

17 Q And was that before the legislature at the time the plans  
18 were enacted, as far as you know?

19 A Yes.

20 Q And what was the 2001 Fair and Legal plan?

21 A That was a plan proposed, I believe, by legislators very,  
22 very close, within several days, of the enactment of the 2011  
23 map. It really wasn't available to us when we were drawing the  
24 plan.

25 Q Okay. And then the last column is the enacted plan in



1 2011?

2 A Yes, Rucho-Lewis 3.

3 Q All right. Let's look at Rucho-Lewis 3 for the county of  
4 Durham and explain to the Court what outside and inside means  
5 so they fully understand this.

6 A Okay. Again, if you look at the last two columns on the  
7 right under the heading 2011, then you look at the two headers  
8 outside and inside, it would tell you that the area outside of  
9 the 2011 district was 20.49 percent African-American. The area  
10 inside was 49.02 percent African-American.

11 Q And so that would be true for all the other entries you  
12 have on this exhibit?

13 A Yes.

14 Q Did you reach any conclusions after you looked at this  
15 exhibit?

16 A Let me just briefly look at it.

17 Q Okay.

18 A With the exception of Greene County, the percentage of the  
19 African-American population outside the district was lower than  
20 the percentage inside the district, which is exactly what you  
21 would think would be the case since the district we're talking  
22 about is an African-American majority district.

23 Q Okay. So in the enacted plan, the African-American  
24 population in Greene County was higher outside the district  
25 than inside the enacted 2011 district, is that right?

1 A That's correct.

2 Q Now, does that -- and the other plans that you analyzed --  
3 how does the black percentage inside and outside of each  
4 version of the 1st District compare in those counties that were  
5 split?

6 A Well, the 2001 enacted map, the baseline map as we  
7 sometimes refer to it, where there was a county split, the  
8 percentage of African-Americans in the portion outside the  
9 district was less than the portion inside the district.

10 Q And that's true for every split county in the 2001 enacted  
11 district?

12 A Yes.

13 Q And what about the Southern Coalition plan? How did -- in  
14 the counties split by the Southern Coalition plan, how did the  
15 black population outside of the district compare to the black  
16 population inside the district?

17 A It was the same as the 2001 enacted plan. The percentages  
18 of the territory outside the districts were smaller than the  
19 percentages inside the district. Again, what you'd expect  
20 again in the creation of a minority district.

21 Q And then, finally, what about the 2011 Fair and Legal  
22 version of the 1st District, how were the -- what was -- what  
23 were the black percentages in the split counties outside of the  
24 district as compared to the portions inside the district?

25 A The portions inside the district had higher percentages

1 than the portions outside.

2 MR. FARR: That's all I have on that, Your Honor.

3 May I approach the witness with another exhibit?

4 THE COURT: You may.

5 BY MR. FARR:

6 Q Dr. Hofeller, I've handed you an exhibit marked  
7 Defendant's 130. Could you tell the Court what this is.

8 A This is my third affidavit in this case -- I'm sorry, in  
9 the *Dickson* case. Sometimes they merge together a little bit.  
10 It was submitted, I think, on the 10th of December in 2012.

11 Q All right. I just want to ask you a very few questions  
12 about this exhibit, Dr. Hofeller. Does this exhibit contain  
13 your criticisms of Dr. Peterson's segment analysis?

14 A Yes.

15 Q Could you tell the Court where that starts.

16 A It starts on page 2 under Heading 2, which is  
17 Dr. Peterson's segment analysis, and it continues on through  
18 page 6 when the report goes into a different topic.

19 Q And do you recall some of the criticisms you had of  
20 Dr. Peterson's segment analysis?

21 A Well, first of all, I had a great deal of difficulty  
22 understanding his segment analysis because when we originally  
23 got it, we didn't get any of the underlying data or the pairs  
24 of precincts that he paired up against each other, so it took  
25 until I could write this third report to get enough data to

1 figure out what he was doing. So that was one problem right  
2 off the bat.

3           When we finally got the data, once again we confirmed  
4 that he was making his conclusions based on 29 of the 330  
5 pairings that were around the border of this district; and,  
6 indeed, in many cases, the precinct inside would be paired with  
7 multiple outside precincts or vice-versa. So when I finally  
8 got the actual precinct pairs that he did, one of the first  
9 things I did was to look at where they were on a map and say,  
10 well, what's the nature of these pairs of precincts that he's  
11 used.

12           And so I figured out that just to highlight it that  
13 16 out of Dr. Peterson's 29 divergent pairs, which was what he  
14 based his decision on, were actually in that corridor area that  
15 was connecting Mecklenburg with -- I guess for you, Your  
16 Honors, it would be this way -- with Guilford and Forsyth  
17 County, so we called that the corridor connection. And that  
18 connection in many cases was only one precinct wide, and the  
19 decisions that were made to place that corridor were guided by  
20 two things. One was to get through that corridor area with the  
21 least population that you needed; and, two, was the placement  
22 of the corridor was guided by the balance of the population  
23 between the new 5th and the new 8th District. So the corridor  
24 was moved to the southeast in order to accomplish that  
25 adjustment of population.

1           The other thing that's noted about the 12 divergent  
2 pairs is they're in areas where the African-American  
3 registration is extremely low. If I were to make a shaded map  
4 of those percentages, they would be in the -- a very large  
5 category, which would be the very lowest one. So it didn't  
6 take into account as to whether or not, for example, that the  
7 black population was 8 percent inside and 6 percent outside  
8 rather than some much larger number which would tell a story.

9           Another problem, of course, was that if you're  
10 drawing the district, even withstanding if you could take this  
11 divergent analysis into account as you're actually drawing the  
12 district, which you can't, the software wouldn't accommodate  
13 it, and the computers wouldn't accommodate it, you may find  
14 that the situation on one side of the corridor precinct was  
15 exactly the opposite of the situation on the other side of the  
16 precinct, so would you have to arrange that corridor so the  
17 political and racial characteristics of the pair-up of the  
18 inside and outside precinct were the same, and I don't think  
19 you could take that corridor through that way.

20           The other problem was that in some cases the same  
21 precinct, either inside or outside, was being paired two times  
22 or more with a different precinct on the other side of the  
23 line. So using the same precinct, in my opinion, twice gives a  
24 slight bias to it. So -- and none of the divergent pairs in  
25 that corridor had to do with any precincts that had high Obama

1 vote or political vote.

2           So if you subtract those out, you have very few left.  
3 You have 11 divergent pairs, if you look at the precincts that  
4 were double counted, and I guess my objection to this method  
5 was to base what I felt was kind of a sweeping generality of  
6 the motivations of how this was drawn -- this district was  
7 drawn on the basis of 11 pairings of boundary precincts out of  
8 330 precincts, just doesn't make much sense.

9           Another problem that I had with this divergent  
10 precinct theory was it doesn't take into account the size in  
11 voters or population of the precincts. So one precinct could  
12 be three or 4,000 people, the other precinct could be 500. So  
13 there was no correction for amplitude of the precincts. What  
14 he really made was what I would call a two tailed test, yes or  
15 no, based on what was in the precinct.

16           And just for illustrative purposes, I went and  
17 analyzed the Obama/McCain vote by precinct in the state of  
18 North Carolina, and I found that if you just assigned a one to  
19 a precinct where Obama won and a one to -- and a zero to McCain  
20 and the reverse for where McCain won, that McCain would have  
21 won the election that year. So it's just -- to me it's just  
22 very shaky in terms of being able to draw the conclusions he  
23 drew.

24 Q     All right. Thank you, Dr. Hofeller. I just have a few  
25 more questions. Could you turn to your first report,

1 Defendant's Exhibit 25.8, which was, I think, prepared on  
2 January 17, 2014.

3 A Okay.

4 Q I want you to --

5 A Okay. I'm not there yet.

6 Q Okay. Sorry.

7 A Could you give me the name of it.

8 Q It's -- the front page says exhibit and expert report of  
9 Thomas B. Hofeller, and there's a blue sticker on the bottom  
10 that says Defendant's Exhibit D-25.8.

11 A 25.8?

12 Q Yep.

13 A Have it.

14 Q What I want to do here is I want to turn to the tables in  
15 this exhibit to make sure that the Court understands what your  
16 tables are. So let's start with Table 1.

17 A Yes, sir.

18 Q Could you tell the Court what Table 1 is.

19 A Table 1 is just a listing of the cities or towns that were  
20 split along the border or split, in some cases, internally one  
21 case in the two plans, so on the --

22 Q For which district?

23 A For the -- well, for --

24 Q We're looking at Table 1 right now.

25 A Table 1 is the 1st District.

1 Q You're comparing split cities or towns between the 2001  
2 Plan and the 2011 1st District, correct?

3 A Yes.

4 Q Can you just -- without going over all this, what was your  
5 concern about the way Dr. Ansolabehere described the split  
6 towns in comparing these two plans? Did you have any concerns?

7 A Well, again, I'd have to review my report on the side, but  
8 I think I had a concern in his analysis of the plan that there  
9 were several cities, three where the splits were either zero or  
10 extremely small and were noncontiguous.

11 So in North Carolina sometimes you find that a very  
12 small portion of a city is outside of the regular boundary of  
13 the city. It's a little kind of a satellite. I theorize it  
14 usually probably for some utility function, like a dump or  
15 water or whatever, and so that would lower the -- in my mind,  
16 the significance of the splits of those cities.

17 Q Okay. Can you turn to Table 2 and tell the Court what  
18 that is.

19 A Table 2 is essentially the same chart for District 12.

20 Q Okay.

21 A And the two plans split the same number of cities, which  
22 we both agree on, Dr. Ansolabehere and I; different cities, but  
23 the same number.

24 Q And could you tell the Court what Table 3 is.

25 A Table 3 is just a resummmary of his envelope percentages



1 for the 1st District, both the old map and the new map and the  
2 12th District for the old map and the new map.

3 Q Okay. Let's look at one of these in detail so the Court  
4 understands exactly what you did. Let's look at Congressional  
5 District 1, which is the top chart. What's the first column  
6 there?

7 A The first column is the party of registration.

8 Q Okay. And then what's the second column?

9 A Second column is the group which subdivides the Democrat  
10 and Republican and undeclared into black and white.

11 Q Okay. And the third column is?

12 A And the third column gives the percentages of the group in  
13 the old district.

14 Q Okay. So, for example, in the Democrat horizontal  
15 section, if you look at white, you're saying that 39.6 percent  
16 of white Democrats were in the old Congressional District 1?

17 A And were Democrats.

18 Q Right, is that correct?

19 A Yes.

20 Q Okay. And then what's -- it says percentage black and  
21 percentage white, what does that mean?

22 A That's just the black figure subtracted from the white  
23 figure, so it's an 18.7 percent difference.

24 Q Okay. And you used the same methodology on all the other  
25 charts on this table, is that correct?

1 A Yes, if you divided it into four sections, it would be the  
2 same.

3 Q Okay. All right. Now, let's now turn to Table 4, and  
4 could you tell the Court what this is.

5 A Table 4 is for the 12th Congressional District, and it  
6 compares the 2010 Census data results and the 2008 general  
7 election data for president for the areas that are both in the  
8 new and old, which is the core of the district in both cases.

9 Q I think we need to explain this one a little bit,  
10 Dr. Hofeller, to make sure the record's clear. So we're  
11 looking at the top chart and the first column on the left-hand  
12 side says area examined, correct?

13 A Yes.

14 Q And what are the areas that you listed?

15 A The area in the new and the old, the core area,  
16 essentially.

17 Q Any other areas?

18 A The second area is the area that was only in the old 12th  
19 but wasn't in the new 12th.

20 Q And the final area?

21 A The area only in the new 12th that wasn't in the old 12th.  
22 Previously we looked at a map of these areas.

23 Q Okay. And then there's a next chart moving to the right  
24 that says 2010 Census data. Could you explain that chart,  
25 please, to the Court.

1 A Again, it gives the total population. To the right of  
2 that is the 18 year old total population and the 18 plus total  
3 black population and the fourth column is the percent total  
4 black.

5 Q So --

6 A Black voting-age population for all people who designated  
7 black as a single race or part of a multiple race category.

8 Q Okay. So the area in the new -- in the old 12th had a --  
9 any part black voting-age population of 56 -- 54.22 percent?

10 A Yes, both in the new and the old.

11 Q Right. And then below that you've got area only in the  
12 old? Could you explain that, please.

13 A Again, this is essentially the area that was removed from  
14 the 12th District when it was redrawn, and it was 22.77 percent  
15 African-American in adult population.

16 Q Okay. And then you've got area only in the new 12th.  
17 What does that percentage mean?

18 A Again, that is the percentage, 43.24 percent, of the total  
19 black VAP or total 18 plus total black, which was added to the  
20 new 12th as it was constructed.

21 Q Okay. And then you have a column that says percent added  
22 minus percent removed areas, and you've got a number of  
23 20.47 percent. Could you tell us what that means.

24 A That was just the difference in percentage between the  
25 area added and the area taken out which said that the area

1 added was 20.47 percent more African-American than the area  
2 that was taken out.

3 Q All right. Now, could you kind of briefly explain the  
4 next chart to the right about the 2008 general election and  
5 tell the Court what that is.

6 A This is the same figure for the 2008 general election for  
7 president which has the total vote for Obama plus McCain, the  
8 total vote in the first column, the total vote for Obama in the  
9 second column, the total McCain in the third column, and the  
10 percent Obama. So essentially it says that the core area,  
11 which is both in the old 12th and the new 12th, was  
12 79.92 percent Obama in terms of the vote.

13 The area that was taken out, which is only in the old  
14 and not in the new, was 53.01 percent Obama, and the area that  
15 was put into the 12th, that wasn't in the old 12th, is  
16 75.39 percent Obama.

17 Q And then what does the -- you have a figure there percent  
18 added minus percent removed in the last column of Table 4 of  
19 22.38 percent. What does that reflect?

20 A That reflects the difference between the 75.39 and the  
21 53.01 percent, so the area put in the 12th had a higher, much  
22 higher, presidential vote at 22 percent higher presidential  
23 vote for the Democratic candidate than did the area that was  
24 taken out.

25 Q Okay. Now, the next question is, what is the chart at the

1 bottom of Table 4?

2 A It's actually a little bit different. It was put in there  
3 to emphasize the differences in population in the counties  
4 between the old and new district so --

5 Q And what does that show about -- you have the urban  
6 counties of Guilford, Mecklenburg, and Forsyth, and then you  
7 have the three corridor counties. What does this chart show  
8 about how the population changed in the urban counties versus  
9 the corridor counties?

10 A Well, of course, the change in population in the urban  
11 counties, the three largest counties, was much different as to  
12 those counties, and I think -- I think I explained that before  
13 when we started that much more of Guilford was added back into  
14 the new 12th District. That was really to help the 6th  
15 District. Less of Forsyth County was contained in the new  
16 district than in the old district by about 90,900, 91,000, and  
17 that was done because -- for two reasons. One because the 5th  
18 District was stronger to begin with and could take those  
19 Democratic precincts and also because it was really a trade off  
20 in the map politically between what you had in Guilford and  
21 what you had in Forsyth, sort of like two ears, and so if one  
22 went down, the other went up because of what was needed to be  
23 done in Mecklenburg for the 8th and the 9th District.

24 And, of course, in Mecklenburg 98,960 more people  
25 were added into the new 12th that was constructed; and, again,

1 that was part of -- mostly because of the 8th District because  
2 we wanted to withdraw as much of the 8th District from  
3 Mecklenburg, and the part we wanted to withdraw, we didn't  
4 really want to put in the 9th. So, again, the Mecklenburg line  
5 was more designed to strengthen the 8th by removing it from  
6 Mecklenburg County and to strengthen the 9th by where that line  
7 went.

8           The corridor, which were the three other counties,  
9 Davidson, Rowan, and Cabarrus collectively, had 60,000 less  
10 people in them in the new district than they did in the old  
11 district; and, again, that was to allow us to do what we needed  
12 to do in the metropolitan counties, vis-a-vis the surrounding  
13 districts and also for population correction between the east  
14 side and the west side of that corridor.

15 Q     Okay. Dr. Hofeller, I just have a couple more questions,  
16 and I'll be done. Could you turn to Dr. Ansolabehere's second  
17 report which is Plaintiff's Exhibit 18.

18 A     Yes.

19 Q     Now, you see his Table 1 where he talks about a  
20 correlation between Obama share of two-party vote and racial  
21 composition and registered voters and VTDs?

22 A     Yes.

23 Q     So the only question I want to ask you is, did you use  
24 registration statistics to draw Congressional District 12?

25 A     No.

1 Q And why not?

2 A Well, first of all, in my judgment, once again, the best  
3 predictor of future voting behavior is past voting behavior,  
4 and the other thing is that if I'd used registration  
5 statistics, particularly racial registration statistics, I  
6 would have violated my instruction, which was not to use racial  
7 data in drawing the 12th District.

8 The other problem I have with using racial  
9 registration statistics in drawing districts is that I don't  
10 believe they're as accurate as some might purport they are.  
11 First of all, if you were going to use registration at all, I  
12 believe you should be using the turnout registration rather  
13 than the total registration because a lot of people aren't  
14 voting, and that would skew the number. It is not a practice,  
15 in actual district drawing, to use registration numbers.

16 You don't account for, for instance, the unaligned  
17 vote. So how are you going to account for that, so it's just  
18 not practical. I was told to treat the 12th District as a  
19 political district as it was treated in 1997 by the legislature  
20 and as it was treated in 2001 by the legislature. It's a  
21 political district, and what was done to the 12th district was  
22 all about politics. It was to make it a stronger Democratic  
23 district and to place it on the map in the areas where it was  
24 most advantageous to the surrounding districts.

25 Q And Dr. Hofeller, you used the term "unaligned voters,"

1 what did you mean by that?

2 A Those are voters that don't give a party.

3 MR. FARR: Okay. Your Honor, that's all I have for  
4 now, and I was wondering, since it's a little bit past 10:30,  
5 could we take a break?

6 THE COURT: Let's take five minutes.

7 MR. FARR: Thank you. Thanks very much, Your Honor.

8 THE COURT: We'll stand at ease for five minutes.

9 (At 10:38 a.m., break taken.)

10 (At 10:57 a.m., break concluded.)

11 THE COURT: All right. Cross-examination?

12 MR. HAMILTON: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. HAMILTON:

15 Q Good morning, Dr. Hofeller. Let's start with where we  
16 left off. One of the things you said twice over the course of  
17 your testimony, and again just before you finished, was the  
18 best predictor of future behavior is past voting behavior.  
19 Did I quote you correctly?

20 A Yes.

21 Q Okay. So if I could direct your attention to the table  
22 that's right up there on the easel right next to you, and, Your  
23 Honors, there's a witness notebook that we provided to the  
24 Court as well, and if it's easier to see, there's a version of  
25 this behind Tab 1 and behind -- I guess it's behind Tab 1, and



1 it's behind Tab 12 as well. Tab 1 and Tab 12 of the notebook  
2 before you is the two posters.

3           So Dr. Hofeller, so you'll agree with me that the  
4 table in front of you summarizes the election results for the  
5 First Congressional District over a series of elections,  
6 correct?

7 A     Well, I guess I have to take your -- I have to take your  
8 table at face value. I haven't actually verified all those  
9 election figures.

10 Q     You were dealing with the 1st Congressional District and  
11 redistricting, were you not?

12 A     Yes.

13 Q     And you were dealing with the 12th, correct?

14 A     Yes.

15 Q     And, in fact, a moment ago you testified that you drew a  
16 political district for 12, District 12, correct?

17 A     Yes.

18 Q     So you must have at the time -- I mean, you may not recall  
19 it today, but at the time you must have been aware of who was  
20 winning and losing elections in those two districts, right?

21 A     Well, I think that it's clear that in the 12th and the  
22 1st, as they've been constituted since 1997, that the  
23 Democratic candidate is one, yes.

24 Q     And in this case in CD 1 and CD 12, the Democratic  
25 candidate in both instances were African-American, correct?

1 A Yes.

2 Q And they not only won, but they won by pretty significant  
3 margins of victory, is that true?

4 MR. FARR: Object to the form.

5 THE COURT: Well, to the extent he knows, he can  
6 answer the question.

7 THE WITNESS: They won decisively.

8 BY MR. HAMILTON:

9 Q Thank you.

10 MR. HAMILTON: If I might approach the easel, Your  
11 Honor.

12 THE COURT: You may.

13 BY MR. HAMILTON:

14 Q The document that you're looking at now, and for the Court  
15 it's behind Tab 12 in the witness notebook, is the same data  
16 with respect to the 12th Congressional District. Do you see  
17 that, sir?

18 A Yes.

19 Q And it's also true in the 12th Congressional District that  
20 the African-American candidate of choice won decisively in  
21 every election since 1992, correct?

22 A That's correct.

23 Q Now, a moment ago you were talking about Dr. Peterson's  
24 segment analysis. Do you recall that testimony?

25 A I do.

1 Q You raised several concerns about it?

2 A I did.

3 Q You're familiar with the Court's decision in the *Cromartie*  
4 case, at least to the extent that you know that the Court cited  
5 Dr. Peterson and relied on his analysis in its *Cromartie*  
6 decision? You know that, don't you, sir?

7 MR. FARR: Your Honor, I'll object since he wasn't  
8 allowed to testify about his understanding of cases in direct  
9 examination.

10 THE COURT: If I understand it, there's two opinions,  
11 and there's a little different analysis as to Peterson's  
12 testimony in those two opinions.

13 MR. HAMILTON: Maybe I can rephrase the question.  
14 All I want to know is if he's aware of the discussion and the  
15 Supreme Court decisions.

16 THE COURT: Yes.

17 BY MR. HAMILTON:

18 Q Are you aware of the discussion of Dr. Peterson's analysis  
19 in the *Cromartie* decision by the United States Supreme Court?

20 A Insofar as it's been mentioned previously in this  
21 courtroom, it's been a long time since I've read the *Cromartie*  
22 cases, and I don't honestly remember any specific citation to  
23 Dr. Peterson. That's really kind of a legal analysis question.

24 Q Okay. And I take it that you yourself in the *Cromartie* --  
25 were you involved in the *Cromartie* cases?

1 A Well, certainly not at the Supreme Court level.

2 Q Well --

3 A I did --

4 Q At any level were you involved, sir?

5 A I don't remember to be honest. It would be in my resume  
6 if it's in there. Everything that I've been involved in. I  
7 certainly was aware of them when they were going on and what  
8 they were about.

9 Q And did you review the segment analysis offered by  
10 Dr. Peterson in the *Cromartie* case, the actual analysis that he  
11 did in that case, did you review it?

12 A No, I've never seen it actually.

13 Q So as you sit here today, you can't -- you can't tell this  
14 Court whether the analysis that Dr. Peterson conducted in this  
15 case is the same or different than the analysis that he offered  
16 in those cases, right?

17 A No, I can't really tell you because I've never seen it.

18 Q So we don't know whether the critiques you're offering  
19 here today would have applied with equal force or perhaps or  
20 just as misguided as that same critique applied to the same  
21 analysis or the analysis offered in *Cromartie*, correct?

22 MR. FARR: Objection, Your Honor.

23 THE WITNESS: I don't understand. Could you explain  
24 the misguided --

25 THE COURT: Hold on just a second.

1 THE WITNESS: I'm sorry, Your Honor.

2 MR. HAMILTON: It was a poorly phrased question.

3 THE COURT: How about rephrasing the question, and  
4 make it a little -- one question at a time.

5 MR. HAMILTON: Thank you.

6 BY MR. HAMILTON:

7 Q Dr. Hofeller, since you didn't analyze, you didn't review  
8 Dr. Peterson's segment analysis in the original *Cromartie*  
9 cases, you can't offer an opinion about how this border segment  
10 analysis offered here is the same or different than the border  
11 segment analysis offered there, right?

12 A I can tell you neither if it was exactly the same method,  
13 nor what actual data led to what actual conclusions.

14 Q All right. A moment ago -- let me direct your attention  
15 to Exhibit D114. It was one of the loose exhibits offered by  
16 counsel a minute ago, and I think I put it right in front of  
17 you so it would be easy to find. D114.

18 A Yes.

19 Q All right. Now, if I understand this table, you prepared  
20 this, right?

21 A I'm sorry, I didn't hear the last part of your question.

22 Q You prepared this table?

23 A I did.

24 Q When did you prepare this table?

25 A Probably a week before last, I'm not sure.

1 Q A week before last. This is not included in your expert  
2 report, is it?

3 A No.

4 Q So this was prepared and created after the Court's  
5 deadline for supplemental expert reports on June 1, right?

6 A Well, I didn't read the Court's supplemental order, so --

7 Q It was after June 1 you created this?

8 A Yes.

9 Q Okay. So let's look at it. You talked a little bit about  
10 it. In all of these places where there's these dashes in the  
11 columns instead of actual numbers, those are places where the  
12 county was not split, right?

13 A Either not split or not in the district at all.

14 Q Okay.

15 A In the case of the 2011 plan, Jones County wasn't in that  
16 district.

17 Q All right. And if we look -- and we're looking at four  
18 different plans here; the 2001 Plan, the 2011 SCSJ plan, the  
19 2011 Fair and Legal plan, and then the enacted plan, correct?

20 A Yes.

21 Q And of all four of those, the enacted plan splits the most  
22 counties, that's pretty clear from this table, isn't it?

23 A Yes.

24 Q And in the enacted plan, just focusing on that, in every  
25 single county, every single county, the black voting-age

1 population included in the district, this is the First  
2 Congressional District, exceeds the black voting-age population  
3 that's outside the district?

4 A Are you talking about --

5 Q All -- every single one except for one in the enacted  
6 plan, correct?

7 A The 2011 plan. Yes, that's correct.

8 Q And when you say 2011, that -- the 2011 I just want to  
9 make sure we're talking about the same plan. The 2011 plan is  
10 the plan that was adopted, sometimes we're calling it the  
11 Rucho-Lewis Plan, that's the plan that was adopted that exists  
12 today?

13 A Yes, but the same situation is true for the three other  
14 plans, too, except there are no counties.

15 Q Well, there's another difference with the other -- two of  
16 the three other plans were never adopted into law?

17 A No, but I think -- I think that they're more apt  
18 comparisons because if you remember, one of the problems with  
19 building the new 1st Congressional District in 2011 was that  
20 the Congressional District was 97,500 plus people short, and so  
21 there were a lot more difficulties involved in forming that  
22 district.

23 The other thing that was important about the first --  
24 the 2011 plan was that the placement of the 2011 plan, the  
25 placement of it was primarily dictated by politics and by the

1 policy decisions, the partisan policy decisions of the people  
2 who were instructing me to draw it. And so the configuration  
3 of the first was really all about, for the most part, the  
4 politics of the surrounding districts and how that enabled us  
5 to do what we wanted to do with those surrounding districts.

6 Q Okay. Well, we'll get to your instructions in a second,  
7 but my question actually was about the number of split counties  
8 in the enacted plan, and I think that your answer to the  
9 question is, with the exception of one county on this list, and  
10 that's Greene County, in every other instance, in every single  
11 instance in which a county is split, the portion that's inside  
12 has a higher black voting-age population than the portion  
13 that's outside. Can you answer that question, sir?

14 A The answer is true, but I might further explain it by  
15 saying, as I did before, that if the 1st District was drawn to  
16 be a majority minority district, and the surrounding districts  
17 were not, that would be logically expected as indicated.

18 Q Sure. It would be logically expected that there would be  
19 more African-Americans inside the district if you were using  
20 race as a criteria to draw the district in order to get the  
21 black voting-age population above 50 percent, correct?

22 A I don't agree with the premise of your question.

23 Q Okay. Well, your instructions were to draw that district  
24 more than 50 percent black?

25 A Yes, but that isn't the question you asked me.



1 Q Okay. But that -- I understand, but you didn't agree with  
2 my premise, so I'm asking you a different question now which  
3 is, your instructions were to draw CD 1 as 50 percent black  
4 voting-age population or higher. True?

5 A No, my instructions were to -- well, 50 percent plus one  
6 person.

7 Q So in light of those instructions, it's not surprising  
8 that we would see in every instance in which there's a split  
9 county that you're going to see more African-Americans inside  
10 than outside, right? That just follows?

11 A Yes, but even if it were drawn as a political draw, and it  
12 were a very strong Democratic district, the same would be true.

13 Q You talked a moment ago about Dr. Ansolabehere's envelope  
14 theory, and if I heard you right, I think you said -- you were  
15 criticizing that where he's talking about split districts, and  
16 you said if you're building a minority district and only part  
17 of the district is going to be in or out, then it's just  
18 logical that you'd have this result where you'd have more  
19 African-Americans inside than out, and it's just, I think you  
20 said, Dr. Ansolabehere's it's just a fancy way of stating the  
21 obvious, and the obvious is that if you set out to build a  
22 minority district then, of course, the part that's in instead  
23 of the part that's out is going to have greater black  
24 voting-age population, right?

25 A Well --

1 MR. FARR: Objection, Your Honor. It's like a  
2 compound question, Your Honor.

3 THE COURT: Well, there was a lot of preface to the  
4 question, but Dr. Hofeller seems to have followed it. If you  
5 understand the question, you can answer.

6 THE WITNESS: Yes, Your Honor. Okay. That's true in  
7 part. The other part of it is, as I stated just a few minutes  
8 ago, even if it were drawn as a Democrat district without  
9 regard to race, I would expect to see the same result.

10 BY MR. HAMILTON:

11 Q Okay. Let's look at Exhibit D124. Again, it's one of the  
12 loose exhibits that was handed up to you. This is the one as  
13 to which we've had some discussion about admissibility. Do you  
14 see that? Do you have that in front of you, sir?

15 A D124?

16 Q Yes.

17 A Yes.

18 MR. HAMILTON: And, Your Honor, at this point --

19 THE COURT: I understand. You're asking the question  
20 subject to our ruling.

21 MR. HAMILTON: Of course. Yes, that, but I also  
22 wanted to clarify because Your Honor asked earlier this morning  
23 about the box at the top of Exhibit 124.

24 THE COURT: Uh-huh.

25 MR. HAMILTON: And we do not have an objection to

1 that table. I want to make that clear for the record.

2 THE COURT: Okay. I didn't --

3 MR. HAMILTON: I don't -- I think I reserved an  
4 objection earlier, and I just want to make it clear that we  
5 don't object to that part of this case.

6 THE COURT: It's just the two boxes below that?

7 MR. HAMILTON: That's right.

8 THE COURT: All right.

9 MR. HAMILTON: Thank you.

10 BY MR. HAMILTON:

11 Q Now, the question I have for you on Exhibit D124 is when  
12 was this document created?

13 A I think the same time as the previous document.

14 Q About two weeks ago?

15 A Yes.

16 Q Do you know why it wasn't produced to the plaintiffs in  
17 this case until yesterday, if you know?

18 A Well, it's really my job to prepare the materials, not to  
19 get them into the record.

20 THE COURT: So the answer is you don't know?

21 THE WITNESS: I don't know, Your Honor.

22 THE COURT: All right.

23 BY MR. HAMILTON:

24 Q Let's start at the beginning here, you received your Ph.D  
25 from Claremont Graduate School in 1980?

1 A Yes, it's now called Claremont University Center.

2 Q You've never been a tenured member of any university  
3 faculty, correct?

4 A That's correct.

5 Q And, in fact, you've never been employed in any capacity  
6 as a faculty member of any university or college, right?

7 A That's true.

8 Q Fair to say that you have not published a great deal of  
9 scholarly articles or studies?

10 A That's true, and what I have is in my resume.

11 Q Now, you mention an article that you published over the  
12 few others. You testified to that yesterday, is that right?

13 A Are you referring to the article on compactness?

14 Q Yes.

15 A Yes.

16 Q Okay. But you've never been the sole author of any  
17 article in an academic journal, correct?

18 A That's true.

19 Q Now, you've worked for various Republican organizations  
20 for many years?

21 A I've worked for Republican organizations, Democratic  
22 organizations, and minority group organizations.

23 Q Fair to say the large majority of your work has been with  
24 Republican organizations and candidates, isn't that true, sir?

25 A That would be fair to say, yes.

1 Q You worked as a consultant for the National Republican  
2 Congressional Committee in the 1990 redistricting cycle?

3 A Yes.

4 Q And you served as a redistricting director for the  
5 Republican National Committee from 1999 to 2003, right?

6 A Yes, I did.

7 Q And then, again, as redistricting coordinator for the  
8 Republican National Committee from 2009 to 2011, right?

9 A Yes.

10 Q And since that time, you've been a private consultant  
11 working with the Republicans, right?

12 A I'm not sure "the Republicans." You mean with --

13 Q Republican party organizations or candidates --

14 A Yes.

15 Q -- or campaign committees?

16 A Yes.

17 Q Had a lot of business this last redistricting cycle,  
18 meaning the 2010 cycle, right?

19 A I'm sorry, again, your question was a little fast for me.

20 Q I'm sorry. You've had a lot of business this  
21 redistricting cycle in 2010 and thereafter, right? You worked  
22 in a lot of different places?

23 A Okay, I'll agree with that.

24 Q You assisted in the redistricting in the state of  
25 Virginia, correct?

1 A Well, I testified in the *Bethune-Hill* case. I wasn't  
2 involved in drawing the plans.

3 Q Fair enough. So in that case you testified on behalf of  
4 the Republican intervenors in connection with a case that was  
5 very similar to this case, challenging a number of House and  
6 delegate districts in the House of Delegates in the  
7 Commonwealth of Virginia, right?

8 A Actually, I think to be accurate to the record, the people  
9 I worked for were the legislative leaders on the Republican  
10 side.

11 Q Who had intervened in the lawsuit?

12 A Yes.

13 Q That's the case we've sometimes been calling *Bethune*  
14 during this proceeding here?

15 A Yes, that's what I'd refer -- *Bethune-Hill*.

16 Q And you were also in the courtroom during the trial of the  
17 *Page* case that was a challenge to Virginia's Congressional  
18 redistricting a year before that, weren't you? At least for  
19 part of the time?

20 A You know, that was in -- I'm sorry, I'm trying to refresh  
21 my memory. That was in Richmond also.

22 Q That was in Richmond, *Bethune-Hill* was in Alexander.

23 A I actually do think I was in the room for that.

24 Q And were you paid to be there or did you just show up out  
25 of curiosity to watch some of the trial?

1 A Well, I wasn't getting hourly pay. I have a retainer, a  
2 monthly retainer, from the Republican National Committee, and I  
3 was interested in the case, and I wanted to go down and hear  
4 it, and it was also close by.

5 Q Okay. And did somebody ask you to go, or did you just go  
6 because it was close by?

7 A I think it was more of my own volition than anything else.

8 Q Now, you were involved in other states as a consultant on  
9 behalf of Republican Party organizations or elected officials  
10 during this redistricting cycle other than just Virginia and  
11 North Carolina, right?

12 A I guess I'd really have to review my resume.

13 Q Let me -- let me -- I'll do it for you, and you tell me if  
14 I misstate anything. You were involved in Texas?

15 A I was involved but peripherally involved. I wasn't  
16 really, to my recollection, involved in any court cases having  
17 to do with the legislative districts or the congressional  
18 districts. I did do some work in county level cases.

19 Q Okay. Well, and so just to be clear, I don't mean to make  
20 this confusing, but you were either involved in litigation or  
21 in drawing the map or consulting with the legislators about how  
22 to draw the map in the following states: One is Texas, right?

23 A Okay. I think we could clarify it a little bit in Texas.

24 Q Sure.

25 A We were, of course, from the national viewpoint very

1 interested in Texas; and, of course, as I do in many states, I  
2 draw maps to find out what can be done. Sometimes I like to  
3 call them goal post maps. You know, what would happen if the  
4 Republicans drew the best map, what would happen if the  
5 Democrats drew the best map. Kind of gives somebody at least a  
6 logical perspective to see what they're asking for because some  
7 people ask for things that are ridiculous.

8 Q You were also -- I'm sorry, I didn't mean to interrupt  
9 you.

10 A I'm sorry. Okay.

11 Q I just wanted to move along because I really just want to  
12 establish you've been involved in a number of different states  
13 recognizing --

14 A Yes, but the degree to which I've actually guided the map  
15 drawing, other than advising people on how to redistrict and  
16 how they could get into trouble and warning about things, is  
17 different from they depended on my advice while they were  
18 actually drafting and took it.

19 Q Fair enough. Fair enough.

20 A Okay.

21 Q You were involved with Florida, correct?

22 A Not really.

23 Q You had no involvement in the Florida redistricting or any  
24 of the litigation after that?

25 A Well, I had involvement in the litigation because you



1 subpoenaed me for the Florida case, but that subpoena was never  
2 I believe -- again, I'm not an attorney. I don't think it was  
3 ever really executed.

4 Q You were involved in Maryland?

5 A Yes, there was a case in Maryland.

6 Q You were involved in Mississippi? You even filed a  
7 declaration in Mississippi, didn't you?

8 A I'm sorry, I don't really remember. There was a lot of  
9 work going on, but if it's in my resume, I certainly went  
10 there.

11 Q While we find the citation for that, how about Arizona?  
12 You were involved in 2000 -- in this cycle in Arizona, too,  
13 weren't you?

14 A This cycle?

15 Q Yeah, in 2010?

16 A Yes.

17 Q South Carolina?

18 A Once again, I'd have to check my resume.

19 Q Okay.

20 A It doesn't really come to mind right off.

21 Q Missouri?

22 A Yes.

23 Q New York?

24 A Yes, but that was a county case.

25 Q On behalf of Republican legislators or party

1 organizations, correct?

2 A Well, it wouldn't have been leg -- it might have been  
3 county legislators; but, actually, I don't think that my expert  
4 report was ever actually submitted. I looked at the  
5 demographics of Nassau County.

6 Q You were also involved in the *Penway versus Harry* case in  
7 Texas? Galveston?

8 A Yes.

9 Q Now, all this work is through your business Geographic  
10 Strategies, LLC, correct?

11 A Well, we just went through a long number of cases.

12 Q Yes.

13 A Some of these cases I wasn't paid for specifically. I  
14 mean, for instance, my involvement in the *Page* case was just  
15 voluntary, so most -- the bulk of the work was through the LLC,  
16 yes.

17 Q And that's called Geographic Strategies?

18 A Geographic Strategies, LLC, yes.

19 Q Dale Oldham is your partner in that company?

20 A He is.

21 Q He's sitting here in the courtroom today?

22 A He is.

23 Q He was also with you in Virginia during the *Bethune* trial?

24 A No, I don't believe so.

25 Q You don't believe Dale was in the courtroom when you

1 testified?

2 A I don't remember his being in the courtroom.

3 Q Okay. And what you do through Geographic Strategies is  
4 provide redistricting services to your clients, whoever they  
5 might be?

6 A Yes, and I think we also mention litigation support.

7 Q Okay. Now, I take it Geographic Strategies, LLC, you're  
8 not the only person out there in the world that does this sort  
9 of thing to assist political parties on either side of the  
10 spectrum in connection with redistricting, true?

11 A That's true.

12 Q You have competitors out there?

13 A I guess you could say that, yes.

14 Q I'm sure you're the very best anyone could ever hire, but  
15 there are other choices out there, isn't that true, sir?

16 A Well, thank you very much. Yes, there are other choices.

17 Q And redistricting services, consulting, map drawing, all  
18 that, that's -- fair to say that's the core of what your  
19 business does, Geographic Strategies?

20 A That's fair.

21 Q Your clients are looking to you to advise them or maybe in  
22 some cases actually draw a map that will stand up to a legal  
23 challenge, true?

24 A I would hope so, yes.

25 Q And --

1 A That's kind of a two-part question, so maybe you could ask  
2 it in two different parts. I might give a different answer to  
3 each part.

4 Q Well, your clients are looking -- when you're drawing a  
5 map for a client on behalf of Geographic Strategies, LLC, your  
6 clients are looking to you to draw a redistricting plan that  
7 will stand up to legal challenge?

8 A Again, I hate to mince words here, but if I'm drawing maps  
9 or advising a client, I might, from my perspective as a  
10 non-attorney, and I always recommend to all my clients that  
11 they get an attorney, a counsel, never travel without counsel  
12 essentially, that I might say to them, I don't think we should  
13 do this or that, and I think we should do this, but ultimately  
14 it's their decision as to how they want to proceed. Otherwise,  
15 I wouldn't have clients.

16 Q Of course. And you're not a lawyer?

17 A No.

18 Q We've established that. So, of course, you would tell  
19 them, rely on legal advice, right?

20 A I always advise people that they should get competent  
21 legal advice.

22 Q So in your declaration, your expert reports, there's --  
23 there's a variety of different statements about *Strickland and*  
24 *Cromartie*, and other Supreme Court cases. You're not a lawyer,  
25 you're not offering legal opinion on what those cases mean,

1 right?

2 A I would just be putting down my view of how I understand  
3 them.

4 Q And how --

5 A Knowing that it's -- it's not in the context of  
6 litigation, a legal opinion.

7 Q Okay.

8 A But I might tell a client at some point you really should  
9 look at this case, it applies. Just as all academics, too,  
10 would be, if they're actually doing redistricting work, would  
11 be familiar with the case law.

12 Q Sure. And you would tell them you really should look at  
13 these cases and talk to a lawyer about what they might mean as  
14 applied to this factual situation, correct? Because you  
15 wouldn't be offering them legal advice?

16 A I don't offer legal advice.

17 Q Because you're not licensed to practice law?

18 A That's right.

19 Q So the Court -- you'll agree with me that the Court can  
20 read *Strickland* and *Cromartie* and all those other cases and  
21 decide what they mean and they shouldn't really pay much  
22 attention to your declaration on those points because you're  
23 not a lawyer.

24 A Well, I think they can give it the weight that they think  
25 it deserves. It's not a legal opinion, but --

1 Q Okay. Fair enough.

2 A Whether or not they're going to pay attention to it is  
3 really up to them.

4 Q It's up to the Court.

5 A Sure.

6 Q You were personally involved in the redistricting in North  
7 Carolina at the time the General Assembly drew these maps,  
8 right? That's what we've just established for the last couple  
9 of hours.

10 A Yes.

11 Q In fact, you were intensely involved in this process?

12 A I think that's a fair statement.

13 Q It's also accurate they call you the principal architect  
14 of the congressional plan that we're examining here today?

15 A I think that's been stated for the record.

16 Q So when we're looking at these enacted plans, these maps  
17 that we've been focusing on for the last couple of days, we're  
18 really looking at your handiwork? You know every single dot  
19 and squiggle on those maps because you drew them, right?

20 A I think that's a bit of an overreach. One of the things  
21 that happens is sometimes other maps are looked at, but it was  
22 my job to keep and examine and give my opinion on the actual  
23 copy of the map as it was being drawn. So I don't describe  
24 myself as being the sole decision-maker. The decision-makers  
25 in this map are the members of the General Assembly who are

1 responsible for the map.

2 Q Of course. And you didn't have the power to adopt the map  
3 or enact it into law; that was the power that rested in the  
4 General Assembly of North Carolina, correct?

5 A For sure, yes.

6 Q Okay. If the plan is struck down, though -- the plan that  
7 got struck down is the plan that you were intensely involved in  
8 and that you drew pursuant to the instructions of your clients,  
9 correct?

10 A I guess that's a fair statement, yes.

11 Q Now, you weren't hired by the North Carolina General  
12 Assembly as a whole, isn't that true?

13 A I was hired by the law firm.

14 Q And when you say "the law firm," you mean Mr. Farr's law  
15 firm?

16 A Ogletree Deakins.

17 Q Ogletree Deakins. And his client was Senator Rucho and  
18 Representative Lewis, wasn't it?

19 A I think you have to ask him who his formal clients are.

20 Q You don't know?

21 A Well, I don't -- for sure, Senator Rucho and  
22 Representative Lewis were clients, but, officially, there might  
23 be somebody else involved. I just don't know.

24 Q You don't know. But that somebody else wasn't the General  
25 Assembly as a whole; it was Mr. Farr's law firm, Ogletree

1 Deakins?

2 A Yes.

3 Q How many times did you meet separately with the Democratic  
4 Caucus while you were drawing these plans?

5 A I don't recall ever meeting with them.

6 Q How many times did you meet with the Democratic leadership  
7 in the North Carolina General Assembly while you were drawing  
8 these plans?

9 A I didn't meet with them at all.

10 Q Well, how about joint meetings of the Democrat and  
11 Republican leadership? How many times did you meet in a joint  
12 setting with the Democrats and the Republicans to talk about  
13 the map you were drawing?

14 A I don't know that there were any joint sessions, but I  
15 didn't meet with -- I already told you I didn't meet either  
16 jointly or singularly with the Democratic leadership.

17 Q Fair to say that you never once talked personally with  
18 Representative Mel Watt about the 12th District and the 2011  
19 Redistricting Plan, correct?

20 A Yes, that's correct.

21 Q It's also fair to say that you've never talked once to  
22 Representative G.K. Butterfield, you know, from the 1st  
23 Congressional District about the 2001 [sic] Redistricting Plan,  
24 right?

25 A I'm sorry, which plan did you say?



1 Q 2011 Redistricting Plan?

2 A Okay. That's true.

3 Q The fact is you took your directions with respect to  
4 drawing these two congressional districts from Senator Rucho  
5 and Representative Lewis, right?

6 A That's correct.

7 Q Didn't get instructions from any other member of the  
8 General Assembly?

9 A I was responsible to these two individuals for the map,  
10 and any map that would have come forth to go into bill form to  
11 go to the floor would need their approval.

12 Q So it's fair to say you answer to them?

13 A I felt I did.

14 Q And they gave you directions for drawing the map?

15 A Yes.

16 Q But they didn't give you directions in any written  
17 document, isn't that true?

18 A I think I already testified to that in other cases in  
19 depositions, yes.

20 Q Well, you might have, but, unfortunately, you know, I have  
21 to bring that up here because these --

22 A Right, no, I didn't get written instructions. I'm sorry.

23 Q So we're not going to see any documents saying, hey, here  
24 is the criteria for drawing these maps that they gave to you;  
25 so be sure you do X or be sure you do Y? They didn't do that,

1 right?

2 A You would find no document that says, to me from them,  
3 here is what we want you to do in writing.

4 Q And there's no email in which they send those same  
5 instructions in email?

6 A No.

7 Q To the best of your knowledge, there's no written record  
8 anywhere of the instructions you got from Senator Rucho and  
9 Representative Lewis?

10 A That's my recollection, yes.

11 Q Now, Dr. Hofeller, I note you've got a Toshiba laptop,  
12 right?

13 A I do.

14 Q Runs Windows 7?

15 A Yes.

16 Q How many other computers do you have?

17 A Personally?

18 Q Yes.

19 A I have a desktop computer at home.

20 Q Yes.

21 A Which I use primarily for personal stuff. Sometimes I  
22 bring items over to email them or print them. I don't have a  
23 printer now working off my Toshiba, so I have to --

24 JUDGE OSTEEEN: All right. Let's just stick to the  
25 numbers for right now.

1           THE WITNESS: Yes, Your Honor. I have this -- I  
2 believe it's a Dell, but I'm not sure.

3 BY MR. HAMILTON:

4 Q     The desktop computer at home. Okay. Do you have any  
5 other computers at home?

6 A     There's another computer at home, which my wife uses  
7 exclusively.

8 Q     Okay. And how about at work?

9 A     Well, work is home.

10 Q    So this is -- which is the computer -- so you've got three  
11 computers here, one of which is exclusively your wife's.

12 You've got a desktop and a Toshiba laptop, and those are the  
13 only two computers that you use in connection with your work?

14 A    Once in a while, if I'm up at the Republican National  
15 Committee -- I have an account there. I would have to say, for  
16 all practical purposes, I don't really have a computer there.  
17 I would have to log on to somebody else's machine.

18 Q    But you do that --

19 A    I don't do -- I don't really do redistricting work up  
20 there --

21 Q    I see.

22 A    -- on districting.

23 Q    Most of your redistricting work is done in your office,  
24 which is at home?

25 A    Yes.

1 Q You save all that information on a computer or hard drive  
2 on the laptop? On the desktop? Where is it stored?

3 A Well, the computers all have hard drives, and all the data  
4 is stored on those hard drives.

5 Q So we've been talking about Maptitude, and you testified a  
6 moment ago this morning that you did some, you know, kind of  
7 what-if maps early in the process, and we've got all these  
8 other kinds of maps that are drawn up. Is that data all saved  
9 on your hard drive on your -- on the one Toshiba, or do you  
10 have an external drive? I'm just trying to understand where  
11 the information is stored.

12 A Okay. The information -- my redistricting computer that I  
13 draw plans on is the Toshiba. It's the only computer that has  
14 Maptitude resident on it. The other computer doesn't. And the  
15 data is all stored on the hard drive, but there's also a  
16 backup.

17 Q A backup electronic hard drive?

18 A You know, an external disk drive that serves as a backup.  
19 I'm not so sure I know how to retrieve data from it because  
20 I've never had a disk crash, so I haven't had to scream for  
21 help.

22 Q How often do you back it up?

23 A Actually, right now, except when I'm on the road, it's  
24 being backed up constantly.

25 Q And you have an email account, right, Dr. Hofeller? I

1 think we actually read it yesterday in connection with one of  
2 the documents we were looking at --

3 A Well, my wife and I share an email account.

4 Q And what is that email address?

5 A Celticheal@aol.com.

6 Q Okay. Celticheel? H-E-E-L at aol dot com?

7 A C-E-L-T-I-C-H-E-A-L. My wife wanted to get celtichealer,  
8 but the account is so old that they wouldn't give us that many  
9 letters.

10 Q Okay. And that's the -- and you use email to communicate  
11 with people in connection with your business?

12 A I do.

13 Q Okay. And that's the -- but that's the only email that  
14 you use for that purpose?

15 A No, I have an account at the RNC.

16 Q You have an email account there?

17 A I do.

18 Q And what's your address there?

19 A Thofeller at -- I think it's gop.com now. It used to be  
20 rnchq.org.

21 Q Are those the only two email accounts you have?

22 A I have a Gmail account, but I really don't use it. I  
23 think I've only sent one message on it, and it was personal.

24 Q Okay. So your -- and then -- so we've got those three  
25 email accounts: The AOL account, the gop.com account, and then

1 this Gmail account that you don't use?

2 A I opened it up and decided it was too much trouble to use.

3 Q Totally understand. Those are the only three email  
4 accounts you have?

5 A Yes.

6 Q Okay. And so if someone wants to reach out to you and  
7 communicate with you in connection with -- maybe they want to  
8 hire you, they would send the email to the celticheal@aol.com,  
9 is that right?

10 A If they were going to communicate to me by email, they  
11 might phone me.

12 Q Well, sure, of course, or meet with you personally; but if  
13 they wanted to communicate by email, that's the way they would  
14 do it; they would send it to that account?

15 A Yep, that's true.

16 Q But you didn't use that account in connection with  
17 redistricting in North Carolina, right?

18 A I don't know what you mean by "that account."

19 Q That account, the celticheal@aol.com. If we were to go  
20 through your inbox and all the stored email, there would be  
21 nothing in there about North Carolina's redistricting because  
22 there would be nothing in there, is that right?

23 A No.

24 Q There is some information in there?

25 A I have communicated between myself and my client, the

1 attorneys.

2 Q With respect to redistricting in North Carolina?

3 A Yes.

4 Q So a moment ago you said that you were told that the  
5 directions for drawing CD 1 and CD 12 were all oral. Do you  
6 recall that?

7 A Yes.

8 Q So the emails that we would see in there, I take it, are  
9 not directions relating to the construction of CD 1 and CD 12?

10 A No.

11 Q Well, what would they be then if they weren't discussions  
12 of how to draw those two districts, sir?

13 A Well, I wrote a lot of -- I'm sorry.

14 MR. FARR: Your Honor, I would just like to object at  
15 this point in time. I don't really know what this has to do  
16 with his --

17 JUDGE OSTEEEN: Let me see counsel up here at the  
18 bench so we don't tip the witness.

19 Dr. Hofeller, sometimes I'll bring counsel up here.  
20 I think it'd be awfully hard to have to sit and listen to a  
21 discussion about objections to testimony without that shaping  
22 testimony. So sometimes I'll do it at the bench.

23 (Bench conference as follows:)

24 JUDGE OSTEEEN: Okay. The way I see this going so far  
25 is the question about how did you get your instructions to

1 narrow down the field to -- because what we've heard -- the  
2 only set of instructions that we've got -- I think it's fair  
3 that his having testified that my instructions were oral, these  
4 were my clients --

5 THE REPORTER: I'm sorry, I can't hear.

6 JUDGE OSTEN: These were my clients and to ensure --  
7 to -- and the instructions were oral to ensure that there's no  
8 other source of instructions that would come in to play here.  
9 I'm assuming the answer is going to be, no, that I didn't get  
10 any other instructions. It seems to me a little bit of inquiry  
11 in terms of what kind of communications. Well, if it's  
12 anything but instructions, without going into the substance of  
13 it. Does that make any sense to you?

14 MR. FARR: Yes, Your Honor, I would just say that  
15 it's hard to ask the witness hypothetical questions about  
16 emails that he may or may not have received.

17 JUDGE OSTEN: The danger I see is the witness -- I  
18 think I'm going to instruct the witness at this point, and  
19 these other judges may disagree, just to -- without going into  
20 the substantive content is describe the nature of the emails  
21 first to confirm, and let's see if that gets us to confirm any  
22 formally written instructions. Does that seem reasonable?

23 MR. FARR: I would defer to the Court, Your Honor.  
24 Again, I just think it's hard for the witness -- I don't  
25 remember who emailed me last week. So it's hard to be



1 responsive to hypothetical questions about what you might have  
2 been told in an email or not; and if they have emails, then  
3 they ought to show them to him.

4 MR. HAMILTON: Your Honor, this witness has been very  
5 clear from the beginning that there's no writings at all. This  
6 is all done in a verbal way. I think that's telling and  
7 relevant and that --

8 JUDGE OSTEN: There aren't any emails on the exhibit  
9 list at this point. So you don't dispute that testimony?

10 MR. HAMILTON: Well, we just heard for the first time  
11 that he's got all sorts of -- well, he's got communications  
12 relevant to the North Carolina redistricting in email, just not  
13 what he would call --

14 JUDGE OSTEN: It's a pretty broad category --

15 MR. HAMILTON: It is, it is.

16 JUDGE OSTEN: -- show up for your deposition  
17 (inaudible) --

18 MR. HAMILTON: Exactly.

19 JUDGE OSTEN: The key point to you at this point is  
20 simply is there anything in there that might have been an  
21 instruction? I understood his answer to be no.

22 MR. HAMILTON: Right.

23 JUDGE OSTEN: So I'll let you test it a little bit,  
24 but I think because we're talking about, as I understood it,  
25 communications between this expert engaged by this firm, the

1 danger of treading into attorney-client communications runs  
2 high, but to the extent -- you're entitled to confirm, as best  
3 you can, that there's no instructions included.

4           So I'm inclined at this point to instruct him that he  
5 can describe without going into the substantive comment --  
6 content, just the nature of the communications to further  
7 explain no written instructions.

8           MR. HAMILTON: And I will try and stay within the  
9 bounds there.

10           JUDGE OSTEEEN: You stay on your toes if he starts  
11 drifting.

12           MR. FARR: And I will just say if he remembers, Your  
13 Honor.

14           JUDGE OSTEEEN: If he remembers.

15           MR. FARR: Okay. Thank you.

16           (Bench conference concluded.)

17           (Discussion among judges.)

18           (Bench conference as follows:)

19           JUDGE OSTEEEN: All right. One concern that we all  
20 have is to the extent there may -- and I'm not suggesting this  
21 happened, but this is an issue. If there were other  
22 instructions given with respect to the map drawing that came  
23 through counsel that are contrary to or maybe over and above  
24 what he's testified to in terms of the legislature, then I  
25 think that would be fair game on inquiry because we've got an

1 issue in there.

2           So at this point I'm going to give the instruction  
3 that I talked about; but to the extent there were directives,  
4 I'm going to expand it to say to the extent there were any  
5 directions given with respect to map drawing, then you need to  
6 describe that. Do you understand that?

7           MR. FARR: I think so, Your Honor.

8           JUDGE OSTEN: So it's without revealing substantive  
9 content, describe the nature of the communications with one  
10 exception, and, that is, if there were any additional  
11 instructions given on behalf of the legislature or given with  
12 respect to the drawing of the maps, you need to talk about  
13 that, and then we'll have to go through it piece by piece on  
14 that. Is that clear?

15           MR. HAMILTON: I think so.

16           JUDGE COGBURN: If the instructions relate to the  
17 facts, doing what he was told to do, then that's fair game. If  
18 he's a traditional expert, and he looked at reports (inaudible)  
19 was told to do (inaudible) --

20           MR. HAMILTON: Sure.

21           JUDGE COGBURN: In other words, you can't  
22 (inaudible)--

23           THE REPORTER: I can't hear. I don't think that  
24 microphone I working --

25           MR. HAMILTON: Understood, understood. I'm not

1 intending -- I don't want to get into Mr. Farr's --

2 JUDGE OSTEEEN: We want to make sure you all  
3 understood the added component to the instruction I'm getting  
4 ready to give so he knows where we're going.

5 MR. HAMILTON: Okay. I appreciate that.

6 JUDGE OSTEEEN: Anything you want to add?

7 JUDGE GREGORY: No.

8 MR. FARR: Thank you, Your Honor.

9 (Bench conference concluded.)

10 JUDGE OSTEEEN: All right. Dr. Hofeller, I hope you  
11 recall the question. I'm not sure I fully recall the question,  
12 but the question related to email communications that you may  
13 have had with counsel in this matter. And I'm going to  
14 instruct you to answer the question with the following  
15 instruction: One, in responding to the question to the best  
16 you can, describe the nature of the communications without  
17 describing any substantive content of the communications. Do  
18 you follow that?

19 THE WITNESS: I do, Your Honor.

20 JUDGE OSTEEEN: And second, to the extent you received  
21 any instructions in your capacity, as the individual drawing  
22 the maps on behalf of the legislature, with respect to the maps  
23 themselves or how they were to be drawn, then I need you to  
24 describe that through these emails. Do you understand that?

25 THE WITNESS: Yes, Your Honor.

1 JUDGE OSTEEEN: All right. You may answer the  
2 question.

3 MR. HAMILTON: Thank you, Your Honor.

4 BY MR. HAMILTON:

5 Q So let's start with -- you -- I believe we've established  
6 that there are emails that you received relating to  
7 redistricting as a general matter on your email accounts, one  
8 or more of your email accounts, correct?

9 A Yes, from all across the country.

10 Q Okay. Well, I'm actually interested in whether you  
11 received communications directly or indirectly from Senator  
12 Rucho or Representative Lewis with respect to drawing CD 1 and  
13 CD 12 during the 2011 redistricting cycle in North Carolina?

14 A I did not.

15 Q Okay. So maybe you could describe for us the nature --  
16 without getting into the substance of them, the nature of the  
17 communications. I'm trying to understand the line between  
18 this -- you received communications about this subject, but you  
19 didn't receive instructions. So I just want to make sure we're  
20 talking about it mean -- what an instruction is.

21 Did you receive guidance from Senator Rucho or  
22 Representative Lewis with respect to CD 1 and CD 12?

23 A Via email?

24 Q Via email.

25 A No.

1 Q Okay. Did you receive instructions from Senator Rucho or  
2 Representative Lewis through counsel with respect to how to  
3 draw CD 1 or CD 12, and by counsel, I mean --

4 A Not to my recollection. I mean, that's been four years  
5 ago. I just don't remember everything, but I do not recall any  
6 written instructions on how to draw the two districts you had  
7 in mind either directly or indirectly via email.

8 Q Okay. And so there was no sort of general guidance, draw  
9 CD 1 as a majority-black district or let's talk about politics  
10 with respect to CD 12? Nothing like that we're going to find  
11 in your emails?

12 A To the best of my recollection, yes.

13 Q All right. So you were -- did you receive instructions --  
14 JUDGE OSTEEEN: Hold on. To the best of your  
15 recollection, the "yes" means you agree with Mr. Hamilton that  
16 will not be in your email?

17 THE WITNESS: To the best of my recollection, it will  
18 not be in my emails, yes, Your Honor.

19 JUDGE OSTEEEN: I wasn't sure what the "yes" meant in  
20 response to the question. You may continue.

21 THE WITNESS: I'm sorry, I apologize.

22 BY MR. HAMILTON:

23 Q Were you told to restrict your communications to verbal  
24 instructions only with respect to CD 1 and CD 12?

25 A As a general rule in redistricting, also in some cases in

1 life in general, I think a person needs to be pretty  
2 circumspect about what they email. I have general instruction  
3 material that I do for people in redistricting and explain to  
4 them that emails are forever, and you really should be very  
5 circumspect about what you send. Is that responsive to your  
6 question?

7 Q Sure.

8 A Okay.

9 Q And "emails are forever," meaning they can be -- they can  
10 be requested in discovery if things go south and there's  
11 litigation, correct?

12 MR. FARR: Objection to the form of the question,  
13 Your Honor.

14 JUDGE OSTEN: No, he can ask what he meant by the  
15 response.

16 BY MR. HAMILTON:

17 Q What do you mean by "emails are forever"?

18 A I mean that generally they are resident on your computer  
19 as long as the disk drive is available.

20 Q Right, but you're not --

21 A And we've seen a lot of that in the national news lately.

22 Q We're not -- your concern isn't that your hard drive is  
23 going to fill up with email. Your concern when you say "emails  
24 are forever" is that the emails might prove what instructions  
25 you were given, isn't that true? That's why you tell people

1 don't -- be careful with what you send in email?

2 A Again, I don't quite agree with the premise of your  
3 question. I just think that in regard to anything to do with  
4 redistricting, as to plans that are being drawn, it's better  
5 not to do it via email, yes, because it's there.

6 Q But what's wrong with it being there, sir?

7 A Well, because some discussions you may have while you're  
8 drafting plans or something that's going on may involve ideas  
9 or situations which everybody agrees later are bad ideas and  
10 shouldn't be done, and so it might not be wise to debate all  
11 these things over what is in the last analysis of public  
12 source.

13 Q Okay. So you follow -- this is, I take it, some general  
14 advice you offer to your redistricting clients wherever they  
15 might be?

16 A Yes.

17 Q And you followed that practice here?

18 A Yes.

19 Q To the best of your recollection, there are no written  
20 instructions in email or text messages, paper, stone tablets,  
21 carrier pigeons, anything; there's just nothing, right?

22 A I mean, the term "written instructions" is pretty wide and  
23 general. I mean, there might be an instruction like when are  
24 you going to be ready, could you get ready sooner.

25 Q Okay.



1 A But if you're talking about instructions on what to draw  
2 and how to draw it, no. I mean, does that answer your question  
3 for you?

4 Q Yeah, I think so.

5 A Okay.

6 Q How about -- I'm just -- now you've raised a question in  
7 my mind about whether we're defining instructions differently.  
8 How about instructions about the black voting-age population to  
9 include or exclude within a particular district? Did you  
10 receive those kinds of instructions in any form of writing,  
11 including email?

12 A No.

13 Q Now, one of the things that Senator Rucho and  
14 Representative Lewis instructed you to do was to, quote, avoid  
15 setting a racial quota, closed quote, right?

16 A Again, I'd have to say what was the context of the use of  
17 the term "racial quota"?

18 Q Well, it's in your second report, which is Exhibit D26.1?

19 A Okay.

20 Q Do you have it there in front of you?

21 A I do.

22 Q Let me direct your attention to paragraph 32 and  
23 specifically line 12, and I'll read it, and you tell me if I've  
24 read it correctly. It starts with the words "this, of course,  
25 would." Do you see that? It's exhibit --

1 A I'm on page 12.

2 Q Of D26.1, page 12, paragraph 32, line 12, far right-hand  
3 side.

4 A I got it, I'm sorry.

5 Q Quote, this, of course, would have been setting a racial  
6 quota, a process which the drafters of the new map were  
7 instructed to avoid by the chairman of the General Assembly's  
8 Redistricting Committee, closed quote. Did I read that  
9 correctly?

10 A Yes.

11 Q Does that refresh your recollection that you were  
12 instructed to avoid setting a racial quota?

13 A Okay. If I may, if I could read the entire paragraph and  
14 understand the context of it?

15 Q Sure.

16 A Okay. If I might say, this is with regard to the 12th  
17 District?

18 Q That's fine.

19 A Okay.

20 Q But you were instructed to avoid setting a racial quota,  
21 correct?

22 A I was instructed not to use race at all in the  
23 construction of that district.

24 Q Well, sir, that's not what you said in paragraph 32. And  
25 the question I have for you with respect to paragraph 32 is you

1 were -- you said, "This, of course, would have been setting a  
2 racial quota, a process which the drafters of the new map were  
3 instructed to avoid by the chairman of the General Assembly's  
4 Redistricting Committee." That's what you wrote in your  
5 report, right?

6 A I did, and that was my understanding of what the  
7 instructions meant to me.

8 Q Okay.

9 A And, that is, to have set a number would be analogous to  
10 having a bright line, and there was no bright line. There was  
11 not any line.

12 Q And those are the instructions you received?

13 A My instructions were to draw the district as a political  
14 district.

15 Q I'm sorry, sir. The instructions you received were to --  
16 in part, were to avoid setting a racial quota?

17 A I don't believe I said that those were the instructions I  
18 received was not to set a racial quota.

19 Q Well, then what --

20 A I believe that -- if a racial quota -- if I had set a  
21 racial quota in my mind, that that would have been in violation  
22 of the instructions to use race in the drawing of District 12.

23 Q Well, let's just return to line 12.

24 A Okay.

25 Q Paragraph 32, "this would have been setting a racial

1 quota, a process which the drafters of the new map were  
2 instructed to avoid" -- now, maybe I stop there. Maybe this is  
3 the problem. The drafters of the new map, that's you, right,  
4 because you're drafting this map?

5 A Yes.

6 Q And when we say "were instructed to avoid by," the person  
7 who is giving the instructions are the chairman of the General  
8 Assembly's Redistricting Committee. That's Senator Rucho and  
9 Representative Lewis, correct?

10 A Well, perhaps I didn't state that sentence as artfully as  
11 I might have. I was given instructions to not use race. That  
12 was a political district, and it was a political draw.

13 Q Okay.

14 A And a quota would be using race.

15 Q I guess --

16 A I just want to continue to say, nobody ever mentioned the  
17 word "quota" to me. Senator Rucho or Representative Lewis,  
18 they didn't use the word "quota."

19 Q Okay. So the instructions that are described in 32,  
20 paragraph 32 of your report, you didn't receive those? You  
21 didn't receive -- you weren't instructed to avoid a racial  
22 quota?

23 A I was instructed to use race in any form except perhaps  
24 with regard to Guilford County.

25 Q Now, we can't actually test that because we don't actually

1 have the instructions you received. Those must have been in  
2 person or by telephone, right? They weren't in any email or  
3 document?

4 A I think -- I've stated many, many times that District 12  
5 in 1997 was justified and accepted as a politically drawn  
6 district. It was drawn as a political district in 2001, and  
7 the instructions were to treat it in the same manner as it was  
8 treated two times before. The only difference is the politics  
9 of the district were going to be different because the  
10 policy -- the political policy goals of the Republican majority  
11 were different than the political policy goals of the  
12 Democratic majority in the previous redistricting.

13 Q Understood, but that, of course, was not an answer to the  
14 question that I asked you. So let me ask it again.

15 You understood from your instructions that use of a  
16 racial quota would be improper in any context? Whether it's CD  
17 12 or any other district, a racial quota is inappropriate,  
18 isn't that true?

19 A In that district, yes.

20 Q In any district, using a fixed numerical racial quota is  
21 illegal; you know that?

22 MR. FARR: Objection, Your Honor. I thought he  
23 wasn't a legal expert.

24 JUDGE COGBURN: If he knows.

25 JUDGE OSTEN: Yeah. I'll let him answer to the

1 extent of his understanding with the caveat he's not an expert.

2 BY MR. HAMILTON:

3 Q Can you answer the question, sir?

4 A The answer to your question is with regard to North  
5 Carolina District 1 and District 12, the instruction was to  
6 draw District 1 with a black VAP level of 50 percent or more.  
7 The instructions for District 12 was to treat it as a political  
8 district.

9 Q You're understanding -- you've drawn maps in states all  
10 across the United States, right? Been involved probably in  
11 redistricting probably longer than I've been alive. You have a  
12 pretty good understanding of --

13 A Are you over 50?

14 Q You have a pretty good understanding of what's permissible  
15 and what's not permissible in drawing maps in redistricting?

16 A Well, what's permissible and not permissible is in a  
17 constant state of evolution.

18 Q Okay. Fair enough.

19 A Okay. So I try and keep abreast of it because I'm not a  
20 lawyer.

21 Q Fair enough. I think we've established that. As we sit  
22 here today, you know, that, for example, using a 55 percent  
23 fixed numerical percentage of black voting-age population would  
24 be improper, isn't it true?

25 A Again, you're asking me to draw a legal conclusion. I

1 think perhaps after some of the cases that are ongoing come to  
2 their ultimate conclusion, that might be different.

3 Q But you don't know right now? As you sit here today, you  
4 don't know whether using a 55 percent black voting-age  
5 threshold to create a district would be proper or improper?  
6 You don't know; the law is in a state of flux?

7 MR. FARR: Your Honor, this is an argument over the  
8 law between the lawyer and the witness.

9 JUDGE OSTEN: Yeah, he said he doesn't know. Let's  
10 move on, Mr. Hamilton.

11 MR. HAMILTON: All right.

12 BY MR. HAMILTON:

13 Q At the end of this process, sir, you never appeared before  
14 the General Assembly to explain the methodology you used to  
15 draw the maps, correct?

16 A Yes. Yes, you're correct, I did not appear.

17 Q And you never appeared in any forum to allow the  
18 membership of the General Assembly as a whole to ask you  
19 questions about the maps?

20 A That's true.

21 Q Never appeared before the Democratic Caucus?

22 A I did not.

23 Q Never appeared before the Black Caucus to describe your  
24 maps and how you drew them?

25 A I did not.

1 Q Didn't meet with Representative Butterfield?

2 A I did not.

3 Q Didn't meet with Representative Watt?

4 A I did not.

5 Q And you certainly never released a public statement saying  
6 that either of these districts were political gerrymanders  
7 designed to benefit Republicans and disadvantage Democrats,  
8 right?

9 A I'll answer that yes, but I would like to clarify that by  
10 saying that it never would have been my job as a redistricting  
11 consultant to the two chairmen of the respective committees to  
12 explain or speak for the map. It was their map that they were  
13 presenting for approval to the legislature, and it would have  
14 been their job to explain the map, not mine.

15 Q Okay. Fair enough.

16 A I don't know in any circumstance in any state with  
17 partisan map drawing where a line-drawing consultant, or even  
18 many experts, would be asked to get up and explain the map to a  
19 legislative body as a surrogate for the legislative leadership.  
20 It would be kind of incomprehensible to me.

21 Q So the answer is you never released a public statement;  
22 it's not your job to do that?

23 A That's right.

24 Q Okay. And you never said it publicly in a speech or other  
25 public statement not in writing that this was a political



1 gerrymander designed to advantage Republicans and disadvantage  
2 Democrats?

3 A You mean after the fact, after it was --

4 Q No, at the time the legislature was considering this?

5 A While they were considering it?

6 Q Um-hum.

7 A No.

8 Q Never said that in an email?

9 A Not that I can recollect.

10 Q So in all this discussion about the political goals of the  
11 map, the General Assembly, as a whole, never heard that  
12 explanation, at least from you, at the time they adopted this  
13 map?

14 A Not from me.

15 Q Neither did the Democratic Caucus; they never heard it  
16 from you either, did they?

17 A No.

18 Q And neither did the Black Caucus?

19 A No.

20 Q Now, let's talk a little bit about the specific  
21 instructions you received from Senator Rucho and Representative  
22 Lewis. They told you to draw the map in such a way as to pass  
23 muster under both Section 2 and Section 5 of the Voting Rights  
24 Act, correct?

25 A That was one of the criteria that they enunciated, yes.

1 Q And you knew it was an important criteria?

2 A Of course.

3 Q And you knew that the Voting Rights Act would be an issue  
4 in drawing at least some of the districts in North Carolina  
5 this cycle?

6 A Well, it'd certainly be an issue because it had to be  
7 precleared under Section 5.

8 Q Right. And there were at least 40 counties in North  
9 Carolina that are covered by -- that at the time were covered  
10 by Section 5, correct?

11 A Yes.

12 Q So in order to comply with Section 5 of the Voting Rights  
13 Act, you have to make sure there's no retrogression in those  
14 covered counties, is that right?

15 A It would be wise to avoid a retrogression, although I  
16 think when you talk about retrogression of a voting rights  
17 district, you're talking really about retrogression of the  
18 district. I mean, just as a hypothesis, if you're drawing a  
19 map and you're drawing a minority district, it may actually  
20 move out of one county and into another county. So you're  
21 looking at retrogression of the district.

22 Q Okay. Fair enough. But the key in -- the key question is  
23 whether the minority community has the ability to elect and  
24 whether the drawing of the district has retrogressed, or  
25 impaired, the ability of the minority community to elect the

1 candidate of its choice. Isn't that the test under Section 5?

2 MR. FARR: Objection.

3 MR. HAMILTON: Your Honor, he received instructions  
4 to avoid this very problem. If he doesn't understand it and he  
5 doesn't know, then he can say that. I'm not examining him --

6 JUDGE OSTEN: Well, let's take him through step by  
7 step. He received instructions, but if you want to go  
8 specifically through what the instructions were or what his  
9 conclusions were and so on -- but it seems to me you've gone  
10 from that instruction directly to what's his opinion on what  
11 Section 5 requires, which takes us immediately into a legal  
12 conclusion. So let's rephrase the question.

13 MR. HAMILTON: I will.

14 BY MR. HAMILTON:

15 Q Let me back up. You received instructions to comply with  
16 the Voting Rights Act, and specifically with Section 5 of the  
17 Voting Rights Act, in drawing these districts, correct?

18 A I received an instruction that said because of the fact  
19 that District 1 was a voting rights district, it had been from  
20 its very inception from the '90s on, because of the Voting  
21 Rights Act, it was to be drawn at 50 percent plus.

22 Q And did you understand what the term "retrogression"  
23 meant?

24 A Well, sometimes it means different things to different  
25 people in different concepts, but my --

1 Q Did you -- I'm sorry.

2 A I'm sorry. But my general academic view of it is is the  
3 minority ability to elect the preferred candidate of their  
4 choice enhanced or made less.

5 Q Right. So it would be in your understanding -- just  
6 asking you to elaborate on that a little bit. If the ability  
7 to elect is impaired, then your understanding is there would be  
8 retrogression?

9 A Yes, but, then again, I'm not deciding a legal case. I  
10 didn't have to decide with regard to District 1 exactly what  
11 that meant because the instruction was very clear as to what  
12 was required both racially and politically on that district.

13 Q Let me direct you to the tab in the witness notebook in  
14 front of you with your name on it, and it's the tab marked Tab  
15 700, and it's an excerpt from the Federal Register. I just  
16 want to know if you -- you mentioned a moment ago that  
17 different people interpret retrogression in different ways, and  
18 I'm wondering have you ever seen the Department of Justice's  
19 guidance on retrogression under Section 5 that was issued in  
20 connection with this redistricting cycle? Did you see this?

21 A I indeed did see it, yes.

22 Q Okay. So let's -- and you reviewed it in connection with  
23 drawing these maps?

24 A I would say I would be more apt to say I reviewed it in  
25 general with drawing maps all over the country.

1 Q So let me direct your attention to page 7471, which is on  
2 the third page of this document?

3 A I'm there.

4 Q Okay. And at the right-hand column, I'm going to read it  
5 and ask if you noticed -- if you read this part of the  
6 guidance, quote:

7 A proposed plan is retrogressive under Section 5 if  
8 its net effect would be to reduce minority voters' effective  
9 exercise of the electoral franchise when you compare it to the  
10 benchmark plan." And then it cites a Supreme Court case.

11 "In 2006, Congress clarified that that means the  
12 jurisdiction must establish that its proposed redistricting  
13 plan will not have the effect of diminishing the ability of any  
14 citizen of the United States because of race, color, or  
15 membership in a language minority group defined in the Act to  
16 elect their preferred candidate of choice, closed quote.

17 You saw that?

18 A I did.

19 Q And you understood that the ability to elect was important  
20 to that analysis? That's consistently your understanding?

21 A That's what the Justice Department says is required.

22 Q Okay. So let's look on a little bit further in this  
23 guidance, the next full paragraph starting with "in  
24 determining," far right column, same page, 7471:

25 "In determining whether the ability to elect exists

1 in the benchmark plan and whether it continues in the proposed  
2 plan, the Attorney General does not rely on any predetermined  
3 or fixed demographic percentages at any point in the  
4 assessment. Rather, in the Department's view, this  
5 determination requires a functional analysis of the electoral  
6 behavior within the particular jurisdiction or election  
7 district, closed quote.

8 Did I read that correctly?

9 A Yes.

10 Q And that's also consistent with your understanding, isn't  
11 it?

12 A Well, it's what the Justice Department has said that is  
13 required.

14 Q And you were certainly aware that at least the Justice  
15 Department believes that a functional analysis was important in  
16 determining whether a plan is retrogressive?

17 A That's what they say, yes.

18 Q Okay. And then one last piece of this, and then we'll  
19 move on. In the lower right-hand corner, far right column,  
20 page 7471, words begin "therefore":

21 "Therefore, election history and voting patterns  
22 within the jurisdiction, voter registration, and turnout  
23 information and other similar information are very important to  
24 the assessment of the actual effect of a redistricting plan,  
25 closed quote.

1 Do you see that?

2 A I do.

3 Q And that's consistent with your understanding of the  
4 Justice Department's view of retrogression?

5 A I'm certainly not going to argue with the Justice  
6 Department about what they say, yes.

7 Q And it's consistent with your understanding of their  
8 position?

9 A That's true, yes.

10 Q And it doesn't really matter what attributes there are to  
11 a map if it doesn't get precleared. That's sort of a pretty  
12 important part or was a pretty important part of adopting a  
13 redistricting map that's in a covered jurisdiction, correct?

14 A Well, yes, if the plan doesn't get precleared, you're  
15 going to have to redraw it or litigate it.

16 Q Now, the map -- your map -- the maps that were drawn here,  
17 Section 1 and Section 12, they were both precleared, correct?

18 A Yes.

19 Q So there was no problem, at least from the Justice  
20 Department's point of view, with preclearance, right?

21 A That's true.

22 Q You weren't surprised by that decision, were you?

23 A No.

24 Q I mean, in fact, the black voting-age population in CD 1  
25 increased rather than holding steady or decreased, so there

1 really was no question that there was going to be preclearance,  
2 correct?

3 A That would have been my understanding, but, you know, with  
4 the Justice Department, you never know.

5 Q Now, with respect to Section 2, it was your understanding  
6 that the 1st Congressional District was to be known as a Voting  
7 Rights Act district, correct?

8 A Once again, my instructions from the chairman of the two  
9 committees was because of the Voting Rights Act and because of  
10 the *Strickland* decision that the district had to be drawn at  
11 above 50 percent.

12 Q Okay.

13 A I didn't really have to interpret in that case, and I  
14 would have left that interpretation up to the attorneys  
15 involved. As it turns out, it's my understanding they were  
16 advising the chairman of the committee.

17 Q Sure. And whatever that discussion was, it filtered back  
18 to you with the express instruction you have to draw CD 1 as  
19 50 percent black voting-age population plus one?

20 A That was my instruction.

21 Q And there were no -- there's no question about that here;  
22 you had to consider the race of the population as you were  
23 moving -- you were drawing the lines of CD 1, moving population  
24 in, moving population out. You had to be looking at the race  
25 of the voters in order to do that because that's the only way



1 you can make sure that you were going to get the 50 percent  
2 plus one, right?

3 A Well, if you add 97,000 people to the district, which is  
4 underpopulated, and you add areas in that are not large enough  
5 and you take areas out that are high enough in percentage and  
6 you take areas out that are very low in percentage, you have to  
7 make sure that in the end it all adds up correctly, yes.

8 Q And when you say "adds up correctly," you mean adds up by  
9 the racial totals, black, white, and whatever other category?

10 A Well, the percentage total, yes.

11 Q Percentage totals?

12 A Yes.

13 Q So just to be clear, and then I'll move on, you did, in  
14 fact, consider race in drawing CD 1?

15 A Yes, but I also considered many other factors, too.

16 Q Fair enough. But to achieve the 50 percent black  
17 voting-age population for CD 1, you had to either move black  
18 voting-age population into CD 1 or white voting-age population  
19 out in order to achieve that 50 percent total. No other way to  
20 do it, right?

21 A Well, the net result had to be 50 percent.

22 Q Now, the instructions you received didn't give you  
23 discretion, well, you know, if you feel like it or as long as  
24 it's consistent with other goals to get to 50 percent .1, or  
25 plus one, it was this is -- this is what's going to be -- it

1 has to be at least 50 percent plus one, and then, beyond that,  
2 you can go up one if you want, true?

3 A I don't think I would characterize it quite that way. I  
4 can go as high as I want.

5 Q Okay. But the -- okay. Well, then, you had to be -- but  
6 it's -- the instructions you received was it had to be  
7 50 percent black voting-age population plus one and -- period,  
8 regardless of any other goals you might have?

9 A Well, I certainly didn't interpret it that it had to be  
10 exactly 50 percent plus one, if I understand your question  
11 correctly.

12 Q And I'm not trying to play games here, but it had to be --  
13 it had -- the floor was 50 percent plus one, and then it had to  
14 be in some range -- reasonable range right above that?

15 A Yes, but there were no limits on that range.

16 Q Okay. All right. Fair enough. But there was a limit on  
17 the range going down? It had to be 50 percent plus one; it  
18 couldn't be anything less than that?

19 A That's correct.

20 Q Regardless of any other --

21 A But there are many ways that that district could have been  
22 drawn to achieve that.

23 Q Sure, but the one nonnegotiable one -- the criteria was it  
24 had to be 50 percent black voting-age population plus one in  
25 addition, of course, to --

1 MR. FARR: Objection --

2 THE WITNESS: I'm sorry.

3 MR. FARR: -- to the term "nonnegotiable."

4 JUDGE OSTEN: All right. I'll allow it. We  
5 understand your point. You can move on.

6 MR. HAMILTON: Okay.

7 THE WITNESS: Am I answering the question?

8 BY MR. HAMILTON:

9 Q No, you don't need to.

10 A Okay. Thank you.

11 Q Let's turn to Plaintiff's Exhibit 11, and it's behind --  
12 it's in the notebook in front of you behind the Tab 11. Do you  
13 see that?

14 A Yes.

15 Q Now, this is an email from you to Joel Raupe, is that  
16 right?

17 A Yes.

18 Q Am I pronouncing the name correctly?

19 A Yes.

20 Q Who is Joel Raupe?

21 A Joel Raupe was retained, I believe, by the legislature to  
22 give general assistance to plan drafting and analysis.

23 Q And is he a lawyer?

24 A No.

25 Q So he's another redistricting consultant that does the

1 same sort of thing that you do?

2 A I wouldn't say he does the same thing I do.

3 Q I'm sure there are very few who do.

4 A Okay. With regard to this project, he was a minor person.

5 Q Okay. And so you were emailing him on a Sunday at  
6 5:26 p.m. in June of 2011, attaching a congressional map, is  
7 that right?

8 A Yes. I was essentially -- I don't recall completely, but  
9 I was probably at that time up north in the DC area, Washington  
10 DC area, I'm sorry.

11 Q And this email, it's from -- it says Tom  
12 Hofeller-redistricting. We can't see the actual email address  
13 here, but do you know which email address that's from?

14 A At that point it would have been THofeller@rnchq.org.

15 Q So that's the one you described a little while ago that  
16 you said now it's GOP. This is the earlier version of the same  
17 account?

18 A Yes. It's -- actually, both addresses work now, which  
19 means I get twice as much junk mail.

20 Q All right. So in the email you say, quote, here is my  
21 latest version of the congressional map. It puts the county  
22 back together. It corrects some boundary line errors and  
23 smooths out the boundaries of the 1st Congressional District  
24 while maintaining its majority African-American status. I hope  
25 that the issues on the majority districts in the House plan get

1 resolved," signed Tom.

2 Is that what you wrote?

3 A That's right there in my email, yes.

4 Q And so what we're doing here -- when you say "maintaining  
5 its majority African-American status," you mean keeping the  
6 black voting-age population at 50 percent or higher, correct?

7 A That would be correct.

8 Q And why were you sending this to Mr. Raupe?

9 A I was sending it to Mr. Raupe in case the chairman of the  
10 committee wanted to see the map where it was at that time. If  
11 we're going to talk about the map, for instance, it's pretty  
12 hard for them to talk with me about the map if they can't see  
13 the map.

14 Q Sure. Fair enough.

15 A Okay.

16 Q You're familiar with the concept of traditional  
17 redistricting principles?

18 A I am.

19 Q And keeping existing precincts intact is a traditional  
20 redistricting principle, no? Isn't it?

21 A It's described that way by some, yes.

22 Q So is respecting -- well, let me ask you: What do you  
23 mean by "it's described by some"? You don't consider keeping  
24 existing precincts intact as a traditional redistricting  
25 principle?

1 A I think, all things considered, it's probably better to  
2 split less precincts; but, remember, a precinct is an  
3 administrative unit, and one of the problems that we have in  
4 North Carolina -- I can say "we" because I live here now -- is  
5 the precincts are very large and, in some cases, very  
6 irregularly shaped, and in many cases, their boundaries don't  
7 follow community-of-interest lines of any sort. There's one,  
8 for instance, in Lee County that I think has 17,000 people in  
9 it, and it goes a long way.

10 So some states' precincts or, as we call them  
11 sometimes, VTDs are much easier to deal with than other states'  
12 VTDs because of the way the policies that the different  
13 counties or states have in drawing them. I wouldn't rate that  
14 high on the list of established redistricting principles, and,  
15 in fact, that hasn't always been the case in North Carolina.

16 Q Okay. How about respect for county lines? That's a  
17 traditional redistricting criteria, isn't it?

18 A It is.

19 Q Now, because CD 1 was treated as a Voting Rights Act  
20 district, you sometimes treated traditional redistricting  
21 criteria a secondary importance when drawing the map, correct?

22 A Sometimes it wasn't possible to adhere to some of the  
23 traditional redistricting criteria in the creation of the  
24 district, and the more important thing was to make a district  
25 which would achieve preclearance and follow the instructions

1 that I had been given by the two chairmen.

2 MR. HAMILTON: Your Honor, may I approach the easel?

3 BY MR. HAMILTON:

4 Q All right. Let me direct your attention to Exhibit 67.

5 It's in the notebook in front of you behind the tab numbered

6 67, and if I could have Ms. Herring put that up on the screens.

7 Let me direct your attention to page 7 and specifically

8 paragraph 7 of this exhibit. Tell me when you're there.

9 Did you find where we are, Dr. Hofeller?

10 A Yes. I'm reading it.

11 Q Oh, okay.

12 A Okay.

13 Q So in the last part of this paragraph -- well, first of

14 all, what is this document?

15 A This is a public statement issued by Senator Rucho and

16 Representative Lewis regarding the proposed Congressional map

17 released, I guess, around July 1, 2011.

18 Q Did you assist in putting this together?

19 A No.

20 Q So this would be the sort of statement that was issued to

21 the General Assembly at the time the redistricting plans were

22 put before the General Assembly?

23 A Well, again, I think you would have to talk to them. I

24 think their purpose was just to make a public statement. So

25 certainly the members of the General Assembly would have this.

1 I'm not sure it was designed specifically for them. I think it  
2 was a general public statement.

3 Q You've seen this before?

4 A Before today?

5 Q Yes.

6 A Yes.

7 Q Okay. So let's start with paragraph 7 in which Senator  
8 Rucho and Representative Lewis are talking about whole counties  
9 and whole precincts. Do you see that?

10 A I do.

11 Q And the last sentence there: "Most of our" -- well,  
12 actually, let me -- I'll just read the whole paragraph:

13 "Counties and precincts are two specific examples of  
14 communities of interest. Like other interests, they must be  
15 balanced. We've attempted to respect county lines and whole  
16 precincts when it was logical to do so and consistent with  
17 other relevant factors. Our plans include 65 whole counties.  
18 Most of our precinct divisions were prompted by the creation of  
19 Congressman Butterfield's majority-black 1st Congressional  
20 District or when precincts needed to be divided for compliance  
21 with the one-person, one-vote requirement."

22 Do you see that?

23 A I do.

24 Q So when it was necessary to split precincts in CD 1 in  
25 order to draw a majority-black voting age population, they were



1 split, true, when it was necessary?

2 A Again, I'm not quite sure on the chronology of this  
3 statement, how it relates to the release of which map. I can  
4 tell you that Congressman Butterfield objected to the first  
5 congressional plan that was released.

6 Q But that's not my question, sir. My question is --

7 MR. FARR: Can he answer his question, Your Honor?

8 JUDGE OSTEN: Yeah, let him --

9 MR. HAMILTON: Your Honor, he's not answering the  
10 question. I am trying to be --

11 MR. FARR: Yes, he is.

12 JUDGE OSTEN: I think he's explaining his answer.

13 So let's go back. The question -- well, state the question  
14 again, and then if you can answer the question yes or no, do  
15 so, and then you may explain your answer.

16 BY MR. HAMILTON:

17 Q So when it was necessary to split precincts to draw  
18 Congressional District 1 with a majority black voting-age  
19 population, they were split, isn't that true?

20 A That would be one reason, yes.

21 Q And the same thing was true for the counties? When it was  
22 necessary to split a county in order to achieve a 50 percent  
23 plus one black voting-age population in CD 1, they were split?

24 A Yes, but I could give a better, more complete answer if I  
25 understood the chronology of and the relationship of this

1 particular document to the release of which plan.

2 Q Okay. Let me direct your attention to page 1 of this  
3 document.

4 A Okay.

5 Q Second paragraph, first page: "Today, we are pleased to  
6 release our proposed 2011 congressional plan, closed quote.

7 Does that help establish the chronology that this was  
8 a statement issued by Senator Rucho and Representative Lewis on  
9 the day that they released the congressional plan?

10 A I understand the day when it was released. I don't  
11 recall, five years later, whether that was the statement in the  
12 release, and with regard to the release, the first plan or the  
13 second plan.

14 Q All right. Now, there's nowhere in this statement, is  
15 there, where Senator Rucho or Representative Lewis explained  
16 that this is a political gerrymander designed to assist  
17 Republican candidates and disadvantage Democratic candidates?  
18 They don't say that in here anywhere, do they?

19 A You know, I'd have to read the whole statement to know  
20 that for sure, but --

21 Q Well --

22 A -- I would say from my experience that public statements  
23 that are made on redistricting plans sometimes do not state  
24 political goals because the politicians don't want to state  
25 them publicly.

1 Q I see.

2 A I think everybody -- from my knowledge and everything that  
3 I heard and saw, everybody understood in the state, Republicans  
4 and Democrats, that since Republicans were drawing the map, the  
5 Republicans would be drawing the map to the advantage of  
6 Republican candidates and incumbents.

7 Q Well, that's not, of course, what this statement says, is  
8 it?

9 A No.

10 Q Okay. Let's look at what it actually says. From the very  
11 beginning -- the first sentence: "From the beginning, our goal  
12 has remained the same: The development of fair and legal  
13 congressional and legislative districts, closed quote.

14 Do you see that?

15 A Yes.

16 Q And then there is a discussion at the very end of the  
17 document about creating more competitive districts, page 7, but  
18 down at the bottom of the page now.

19 A Um-hum.

20 Q And it says: "The federal and state constitutions allow  
21 legislatures to consider partisan impacts in making  
22 congressional redistricting decisions. While we have not been  
23 ignorant of the partisan impacts of the districts we have  
24 created, we have focused on ensuring that the districts will be  
25 more competitive than the districts created by the 2001

1 legislature. Along those lines, we wish to highlight several  
2 important facts. First, in 12 of our proposed 13 districts in  
3 the 2008 General Election, more voters voted for Democratic  
4 candidates for attorney general, Roy Cooper, than those who  
5 voted for the Republican candidate.

6 "Second, registered Democrats outnumber registered  
7 Republicans in 10 of our proposed 13 districts. And, finally,  
8 the combination of registered Democrats plus unaffiliated  
9 voters constitutes very significant majorities in all 13  
10 districts, closed quote.

11 Did I read that correctly?

12 A Yes.

13 Q There's nothing in there about a partisan gerrymander  
14 designed to assist Republican candidates and disadvantage  
15 Democratic candidates, isn't that right?

16 A That's true, but I think that everybody, again, reading it  
17 would know that the vote for Democratic Attorney General  
18 Candidate Roy Cooper was an extremely high victory margin, and  
19 also talking about registration is not talking about expected  
20 election outcomes. That's precisely why we don't use them in  
21 drawing plans.

22 Q Sure, but in putting together this statement and issuing  
23 it for the consideration of the General Assembly in assessing  
24 the plan they were releasing, this is what they said. They  
25 didn't say anything about not using voter registration or the

1 extremely high turnout or -- they simply said nothing of the  
2 sort.

3 A No, it was just a public statement.

4 Q Just a public statement --

5 A Yes.

6 Q -- for consideration by the General Assembly in  
7 considering its plan?

8 A To take it as they understood it.

9 MR. HAMILTON: Your Honor, I'm about to switch  
10 topics. I'm happy to continue, but it's 12:30.

11 JUDGE OSTEEEN: How much longer do you think you have?

12 MR. HAMILTON: Probably another hour.

13 JUDGE COGBURN: Are we going to get through today?

14 MR. HAMILTON: Oh, absolutely.

15 MR. FARR: Your Honor, we're going to have to have  
16 some redirect on this witness, and we have two more witnesses.

17 MR. HAMILTON: I can go through at lunchtime and see  
18 what I can do to shorten it up.

19 JUDGE OSTEEEN: If you'll use your lunch to make the  
20 examination more compact by way of a Reock -- I can't even  
21 pronounce the word right now. If you'll use it to make it more  
22 compact -- how about we stick to maybe 45 minutes for lunch.  
23 All right. Let's take a 45-minute lunch recess.

24 (At 12:36 p.m., break taken.)

25 (At 1:20 p.m., break concluded.)

1 JUDGE OSTEEEN: All right. A couple quick  
2 housekeeping matters. Because we have law clerks over here,  
3 today I'm going to ask all the spectators to stay around in the  
4 back part of the gallery. I don't anticipate -- ordinarily,  
5 that part is open, but it's a little different seating  
6 arrangements, so stay around to that side.

7 In anticipation of the fact that it may look like a  
8 four-alarm fire drill when we end this case and everybody  
9 leaves, in case I forget, to allow for the preparation of an  
10 expedited transcript, which we think will be done and completed  
11 on Monday, we're going to extend the findings of fact deadline  
12 to the following Monday. We're going to give an extra three  
13 days to allow for preparation of that transcript.

14 MR. HAMILTON: Thank you, Your Honor.

15 JUDGE OSTEEEN: So I would say, unless something  
16 changes, proposed findings of fact and conclusions of law --  
17 and, frankly, if you're going to get a transcript, I would like  
18 citations in the findings of fact so we know where in the  
19 record to go. That will be due Monday, if my math is correct,  
20 October 26 by 5:00.

21 MR. SPEAS: Your Honor, if I may raise one more  
22 housekeeping matter? We've been keeping up with the time, and  
23 our understanding was that the time would be divided equally.  
24 Assuming six-hour court days, the defendants have exceeded  
25 their time at this point. We just wanted to bring that to the

1 Court's attention.

2 JUDGE OSTEEEN: When did you all start yesterday?  
3 About 11?

4 MR. FARR: Yes, Your Honor. I mean, I didn't know  
5 that anyone was keeping track of it. We certainly didn't hear  
6 that from the Court.

7 JUDGE OSTEEEN: Well, yeah, that's an agreement  
8 between the parties. We did -- the anticipation was, certainly  
9 as expressed, that the time would be divided equally.

10 With cross-examination, I mean, it's -- if we're  
11 going to get through today, then everything is going to have to  
12 be shrunk or compacted from here on out to move through. This  
13 is not a jury trial. All of the judges up here know how to  
14 find facts, listen to the evidence, and draw reasonable  
15 conclusions; and these two can get it on one try, and I  
16 guarantee you I can get it without having heard it twice. So  
17 let's remember that and keep on moving for the rest of the  
18 time. We'll just do the best we can.

19 At this point, I will say, Mr. Speas, I don't have  
20 any sense that the defendants have -- by comparison, that the  
21 defendants have unfairly prolonged their part, but if everybody  
22 can keep moving --

23 MR. SPEAS: I just note for the record that by our  
24 records, they have -- we have used 6 hours and 54 minutes.  
25 They have used 9 hours and 24 minutes.

1 JUDGE OSTEEEN: Well, it feels like everybody used 60  
2 hours. So let's just move along as best we can.

3 MR. HAMILTON: Thank you, Your Honor.

4 BY MR. HAMILTON:

5 Q Dr. Hofeller, I put back up the table of election results  
6 from the 1st Congressional District, and that's behind Tab 1 in  
7 your notebook, if you would like to look at it; and I will ask  
8 you to assume with me that the black voting-age population  
9 numbers are accurate. They're drawn from other documents in  
10 the record, but assuming those are true, it is -- it's fair to  
11 say, first looking at the percentage of vote in all these  
12 elections from 1992 to 2014, in the 1st Congressional District,  
13 I think you testified earlier that it was the African-American  
14 candidate of choice won decisively, correct?

15 A I did.

16 Q Okay. And so something -- something is going on here. In  
17 every election, there was a significant number of other voters  
18 that were voting with the African-American community in those  
19 districts that brought their vote total up considerably. So  
20 let me give you a specific example. 1998, the black voting-age  
21 population in CD 1 was 46.54 percent. Do you see that?

22 A Yes. And I might ask, do you mean BVAP or do you mean  
23 T-BVAP?

24 Q The black voting-age population we're using is any part  
25 black?



1 MR. FARR: For what year is that?

2 MR. HAMILTON: I just randomly picked one as 1998.

3 THE WITNESS: Okay, well, yes, it's 46.54.

4 BY MR. HAMILTON:

5 Q And, yet, Eva Clayton, the African-American candidate of  
6 choice, received 62.24 percent of the vote, correct?

7 A That's correct.

8 Q So we don't need to do a lot of fancy calculations here to  
9 understand that there was a significant number of white voters  
10 who crossed over and voted with the African-American community  
11 in order to yield that kind of a winning percentage, correct?

12 MR. FARR: Objection.

13 THE WITNESS: Yes, we -- we don't know precisely --  
14 for purposes of analyzing the votes as opposed to drawing a  
15 district, I would -- it would be interesting to see what the  
16 turnout figures were.

17 BY MR. HAMILTON:

18 Q Sure, but as a functional or as a practical matter, there  
19 was a sufficient number of white voters who voted with the  
20 African-American community to elect those candidates by  
21 decisive margin in each one of these elections, right?

22 MR. FARR: Objection, Your Honor. There's no  
23 foundation for that.

24 JUDGE OSTEN: Well, I'm going to see -- I'm going to  
25 allow him to answer.

1           THE WITNESS: I think that even taking into account  
2 that there are other races involved, that it was certainly  
3 significant number -- amount of crossover. Of course, how much  
4 you get in the election, too, depends on the candidates that  
5 are running and the kind of campaigns they're running and  
6 whether it's a serious candidacy, et cetera, but I think that's  
7 the case. We just don't know what the turnout was, how many  
8 people actually voted and how many people were registered.

9 BY MR. HAMILTON:

10 Q     Sure. And between 1998, when the plan was -- the 1997  
11 plan was first implemented, and the 2012 election, in each of  
12 those instances, the black voting-age population was less than  
13 50 percent, isn't that right?

14 A     Between 1998 and 2010, yes.

15 Q     And, yet, in each of those elections, the African-American  
16 candidate won?

17 A     Yes, another consideration you would also want to know is  
18 what is the percentage of non-Hispanic whites, but, okay, I'll  
19 go with that.

20 Q     So by definition, at least in CD 1, there wasn't racially  
21 polarized voting in CD 1 sufficient to prevent the  
22 African-American community from electing their candidate of  
23 choice. We know that, don't we?

24           MR. FARR: Objection, Your Honor. There's been no  
25 polarization study offered.

1 JUDGE OSTEEEN: Well, he's an expert on -- I think it  
2 included voter behavior, or something of that effect. So to  
3 the extent he can -- I'll allow the question to the extent he's  
4 able to respond.

5 THE WITNESS: Again, if you're going to do a  
6 polarization study, you might not know what the degree of  
7 polarization would be for the ability of black candidates to  
8 elect their preferred candidate of choice unless you looked at  
9 election and registration data and also if you looked at other  
10 races in the area. Again, these are -- these are strong  
11 Democratic districts, and I don't think they're heavily  
12 contested.

13 BY MR. HAMILTON:

14 Q Okay. They're strong Democratic districts, not heavily  
15 contested with a black voting-age population of less than  
16 50 percent, but, nonetheless, they're able to elect the  
17 African-American candidate of choice in every one of those  
18 elections between 1998 and 2012?

19 A Yes, but I'm not sure which -- to the extent that the BVAP  
20 measures that, the amplitude of it.

21 Q By the way, as long as we are talking about polarized  
22 voting analyses, you didn't do a polarized voting analyses for  
23 the General Assembly at the time that you were preparing these  
24 maps, correct?

25 A That's true.

1 Q And one of the things that happened in CD 1 is that you  
2 moved Durham County -- or part of Durham County into CD 1 that  
3 hadn't been there before, correct?

4 A I did, and the reason that that was done --

5 Q Well, I'm just asking whether you did it.

6 A Okay, but I would like to --

7 Q And I'll ask you in a sec -- the part of Durham County  
8 that you moved in was the heavily African-American part of  
9 Durham County, isn't that true?

10 A Well, it had to be.

11 Q Okay. And *Gingles* said -- you were involved in the  
12 *Gingles* case, weren't you, sir?

13 A I was.

14 Q You were an expert in that case, weren't you?

15 A I was.

16 Q And you read the *Gingles* decision?

17 A A long time ago.

18 Q But you know that *Gingles* said that there was no racially  
19 polarized voting in Durham County? You remember that, don't  
20 you, sir?

21 MR. FARR: Objection, Your Honor. That's not what  
22 *Gingles* said.

23 JUDGE OSTEN: Well, he's asked what he recalls, so  
24 he can answer the question.

25 THE WITNESS: Again, since I haven't read *Gingles* for

1 a long period of time --

2 BY MR. HAMILTON:

3 Q You don't recall?

4 A Well, I don't recall specifically what the decision said.

5 Is that fair?

6 Q That's fair. I'm not asking you specifically, but,  
7 generally speaking, you have a recollection, don't you, that  
8 *Gingles* said there was no racially polarized voting in Durham  
9 County?

10 MR. FARR: Objection, Your Honor.

11 JUDGE OSTEN: If you recall, you can answer.

12 THE WITNESS: I don't recall enough to state it as a  
13 fact, but I think that was generally found, that there wasn't  
14 that level of polarization.

15 BY MR. HAMILTON:

16 Q Thank you. Now, let's talk about CD 12 for a minute.  
17 When you started with drawing CD 12, where did you start? Did  
18 you have -- did you take up -- pull up the old version of CD 12  
19 and overlay that on the screen and then start making changes to  
20 it?

21 A I don't remember specifically, but I'm pretty sure that I  
22 actually copied the old version of 12 -- well, the whole map --

23 Q Including --

24 A -- and made a 2011 version.

25 Q Okay.

1 A But it was a long road between putting the old 2001 map in  
2 there and getting to the point where you had the 2011 map; but,  
3 as I stated before, we wanted to keep District 12 in the same  
4 area was -- primarily because that's what we wanted to do to  
5 accomplish our political policy goals with regard to the  
6 districting plan.

7 Q Now, with respect to drawing the 12th Congressional  
8 District, Senator Rucho and Representative Lewis expressed some  
9 concerns about complying with the Voting Rights Act in that  
10 district, isn't that true?

11 A I don't know. I would have to see the documents where  
12 they actually made that expression to see if that was  
13 specifically what they said.

14 Q Well, let's talk generally about what they said. They  
15 expressed some concerns about avoiding retrogression under  
16 Section 5 and, in particular, in Guilford County, correct?

17 A Well, I don't see how you can retrogress a political  
18 district in terms of the Voting Rights Act. You might  
19 encounter a fracturing complaint but not a retrogression  
20 complaint.

21 Q Guilford County was a covered jurisdiction under Section 5  
22 at the time you were drawing these maps, correct?

23 A Yes.

24 Q And Guilford County had a substantial number of  
25 African-American population?

1 A It did.

2 Q So let's look again at Exhibit 67. Your Honor, if I might  
3 remove the easel? Can we display Exhibit 67 on the screen?

4 All right. This is the statement we were looking at  
5 a little while ago from Senator Rucho and Representative Lewis,  
6 is that right.

7 A The July 1st statement?

8 Q Correct.

9 A Yes.

10 Q Now, if I could direct your attention to page 5 of this  
11 statement. In the middle of the sentence -- I mean, in the  
12 middle of the paragraph, and I'll read it, it begins, "because  
13 of the presence." Do you see that?

14 A Yes.

15 Q Quote: Because of the presence of Guilford County in the  
16 12th District, we have drawn our proposed 12th District at a  
17 black voting-age level that is above the percentage of the  
18 black voting-age population found in the current 12th District.  
19 We believe that this measure will ensure preclearance of the  
20 plan, closed quote.

21 Did I read that correctly, sir?

22 A You did read it correctly.

23 Q And that's a true statement, correct?

24 A It wasn't as I was instructed to draw the plan, no.

25 Q You don't have any reason to argue with Senator Rucho or

1 Representative Lewis about what they said in this statement, do  
2 you?

3 A I don't want to be put in the position of arguing with  
4 them, but all I can tell you is what my instructions were in  
5 drawing the plan, which is not the way the district was drawn.  
6 Again, this is a public-facing statement. It's really a  
7 political statement.

8 Q They instructed you to place, quote, substantial  
9 African-American population, closed quote, in Guilford County  
10 in CD 12, isn't that true?

11 A My instructions in drawing the 12th District were to draw  
12 it as it were a political district, as a whole. We were aware  
13 of the fact that Guilford County was a Section 5 county. We  
14 were also aware of the fact that the black community in  
15 Greensboro had been fractured by the Democrats in the 2001 map  
16 to add Democratic strengths to two Democratic districts.  
17 During the process, it was my understanding that we had had a  
18 comment made that we might have a liability for fracturing the  
19 African-American community in Guilford County between a  
20 Democratic district and a Republican district. When the plan  
21 was drawn, I knew where the old 97th, 12th District had been  
22 drawn, and I used that as a guide because one of the things we  
23 needed to do politically was to reconstruct generally the  
24 97th district; and when we checked it, we found out that we did  
25 not have an issue in Guilford County with fracturing the black



1 community.

2 Q Do you recall your deposition being taken on May 6, 2014?

3 A I recall giving a deposition. I don't know the date.

4 Q And do you recall being asked the following question and  
5 being -- giving the following answer, and this is page 37 of  
6 the deposition transcript?

7 "Question: Did you receive an instruction from  
8 Representative Lewis and Senator Rucho to draw the  
9 12th District as a black voting-age level that is  
10 above the level -- black voting-age level in the  
11 current 12th District?

12 Answer: Actually, my understanding of the issue  
13 was because Guilford was a Section 5 county and  
14 because there was a substantial African-American  
15 population in Guilford County, the portion of the  
16 African-American community was in the former  
17 District 13 was a strong -- which was a strong  
18 Democratic district was not attached to another  
19 strong Democratic district that it could endanger  
20 the plan and make a challenge to the plan."

21 Do you recall that?

22 MR. FARR: Your Honor, may I request that the witness  
23 be shown his testimony instead of being asked whether he  
24 recalled it?

25 JUDGE OSTEN: Well, let's see what he says first,

1 and then if he needs to look at it, he can.

2 THE WITNESS: I would really like to see the context,  
3 if I might?

4 MR. HAMILTON: May I approach?

5 THE WITNESS: Okay. I've read it.

6 BY MR. HAMILTON:

7 Q Does that refresh your recollection that that was your  
8 testimony in your deposition?

9 A Well, I stand by my testimony, but that does not say that  
10 the 12th District was to be drawn as if it were a voting rights  
11 district or if it were to attain any specific level of black  
12 population.

13 Q Fair enough. You're right; it doesn't say that.

14 A Could I finish?

15 MR. HAMILTON: Well, I don't think there's a question  
16 pending, Your Honor. I'm happy to allow him, but we're --

17 JUDGE OSTEN: Yeah, we want to try to move along, so  
18 let's stick to answering the questions, and I think you have.  
19 Next question.

20 BY MR. HAMILTON:

21 Q In the benchmark plan, Guilford County was split between  
22 multiple districts, including CD 12, correct?

23 A I'm sorry. Could you repeat that?

24 Q In the benchmark plan, the 2001 Plan, this county,  
25 Guilford County, was already split between districts, including

1 CD 12?

2 A Yes.

3 Q And you reunited a portion of Guilford County back into CD  
4 12, correct?

5 A Yes.

6 Q Not all of it, just a piece of it?

7 A That's correct.

8 Q And the piece of it was the piece with the substantial  
9 African-American population. That's the part that got moved  
10 into CD 12, correct?

11 A Yes, but it wasn't moved into CD 12 because it had a  
12 substantial black population. It was moved into CD 12 because  
13 it had a substantial Democratic political voting record and  
14 because I was looking at the old District 97 and those portions  
15 had come -- were part of the old District 97.

16 Q And the part without a substantial African-American  
17 population, that was the part of Guilford County that was not  
18 moved into CD 12, correct?

19 A Again, I didn't look at the black population while I was  
20 drawing it. I was looking at the political data.

21 Q So Guilford County remains fractured in the enacted plan  
22 as well as in the benchmark plan, correct?

23 A Yes, but my recollection was it was fractured three ways  
24 in the 2001 Plan and two ways in the successor 2011 Plan.

25 Q Okay. Let me back up. At the beginning, when you were

1 starting this process of drawing these maps, you collected some  
2 data -- or, rather, the State assisted you in collecting some  
3 data upon which you would be drawing the map, correct?

4 A The State produced a database, which was incorporated into  
5 their system and our system.

6 Q And that included the results of past elections and past  
7 voter registration, correct?

8 A Yes.

9 Q And they were gathering those results to be put into a  
10 database that could be used to draw the new maps?

11 A They had a very large database, yes, which you could  
12 choose portions to use and portions not to use.

13 Q For the purpose of drawing the maps?

14 A Precisely.

15 Q And in your view, it was felt that the data is required in  
16 order to draw lines and make the evidence -- make the decisions  
17 that need to be made; that was the standard practice, right?

18 A You never know while you're drawing a map what information  
19 some people may want to know about the map, particularly the  
20 incumbent members. And so it's always better to err towards a  
21 larger database than you might prefer yourself just to make  
22 sure you don't have to go back and catch up on something.

23 Q Sure. And the data that was collected included voter  
24 registration data?

25 A It did.

1 Q That wasn't a rookie mistake, was it?

2 A A rookie mistake?

3 Q It wasn't a rookie mistake to collect voter registration  
4 data in connection with drawing in this redistricting process?

5 A No.

6 Q Now, when you were drawing CD 12, I believe you testified  
7 that you had the 2008 Presidential Election results on your  
8 screen. Do you recall that testimony?

9 A I did.

10 Q That's the Obama vote in 2008?

11 A Yes.

12 Q And when you were drawing the map, you did not look at the  
13 governor 2008 election as you drew the map, correct?

14 A That's correct.

15 Q And you did not use the 2010 Senate data, correct?

16 A That's right, because I had looked at it previously, and I  
17 had analyzed it and actually made a correlation of it before we  
18 started drawing.

19 MR. HAMILTON: I move to strike, Your Honor. This is  
20 not responsive, and it's not in his expert report either, and I  
21 didn't ask for it.

22 JUDGE OSTEN: I understand. I think he's entitled  
23 to explain his answer. You looked at the data and made a  
24 conclusion, correct?

25 THE WITNESS: Yes, Your Honor, I looked at the other

1 data, and I concluded that it tracked -- all of these races  
2 tracked each other, and there was no need to use an additional  
3 race while drafting.

4 BY MR. HAMILTON:

5 Q Now, the 2008 Presidential Election, that's the election  
6 that you primarily relied on, right?

7 A Yes.

8 Q That was a pretty unusual election, wasn't it?

9 A Well, it was a Democratic-Republican presidential  
10 election.

11 Q Sure. And the Democratic nominee was Barack Obama,  
12 correct?

13 A Yes.

14 Q Barack Obama is an African-American, true?

15 A He certainly is.

16 Q He was a black man running for president?

17 A Yes.

18 Q It was the first time the Democrats had ever nominated an  
19 African-American candidate for president?

20 A That's true.

21 Q The first time in our nation's history since the founding  
22 of the country that an African-American candidate ran for  
23 president as the nominee of one of the two major American  
24 parties, isn't that right?

25 A To the best of my recollection.

1 Q And that wasn't a secret here or anywhere else. There was  
2 a lot of talk about that during the course of that election,  
3 isn't that true?

4 A I think everybody was aware of it in the country, yes.

5 Q And in your experience, as a political consultant drawing  
6 maps for 40 some years, the race of a candidate can have an  
7 effect on voter behavior, true?

8 A Sometimes yes, sometimes no.

9 Q And sometimes yes right here in North Carolina, isn't that  
10 true?

11 A Sometimes yes, sometimes not.

12 Q Okay. The Obama campaign in 2008 went out of its way to  
13 try and mobilize the African-American community across the  
14 country, including in North Carolina, isn't that true?

15 A I don't think that I was particularly cognizant of the  
16 campaign plan for both presidential campaigns in North  
17 Carolina.

18 Q So if some people didn't want to vote for an  
19 African-American candidate, that would make them unlikely to  
20 vote for Barack Obama, correct?

21 A If they decided they couldn't vote for any  
22 African-American candidate, it would follow logically that they  
23 wouldn't vote for Barack Obama.

24 Q And it would also -- the reverse is also true, that if an  
25 African-American voter wanted to vote for an African-American

1 candidate because he was the first presidential candidate, that  
2 would make it more likely that that voter would vote for  
3 President Obama, isn't that true?

4 A Well, I would say it would be likely in any circumstance,  
5 from what we know about voting behavior in the state, that  
6 African-Americans would vote for the Democratic nominee,  
7 whoever that nominee was. I think the better analogy is to say  
8 the turnout was probably increased.

9 Q Who ran for governor in 2008 in North Carolina?

10 A I believe Governor Perdue.

11 Q What was his [sic] race?

12 A White.

13 Q Not a black man?

14 A No.

15 Q Who ran for Senate in North Carolina in 2008?

16 A I don't rightly recall right now.

17 Q Do you recall his race?

18 A I think the candidates were white.

19 Q Neither one were a black man running either for Senate or  
20 the governorship, correct?

21 A If I don't remember who it was, I couldn't say.

22 Q But the only data you used to draw this map was from the  
23 first presidential race in American history with an  
24 African-American major political party candidate, right?

25 A That's right, but as I've already stated, I knew that that



1 race tracked all the other races. While he might have gotten a  
2 slightly higher vote, the precincts would still fall out in the  
3 same order.

4 Q You addressed compactness measures in your report, right?

5 A I did.

6 Q And courts look at compactness measures in these sorts of  
7 lawsuits from time to time?

8 A Yes.

9 Q You even warn people in your PowerPoint presentations on  
10 redistricting, when you're training people on redistricting  
11 topics, quote -- to quote: Be careful of the compactness  
12 standards you adopt. They may come back to bite you on the  
13 rear in court, closed quote. That's from your slide  
14 presentation, right?

15 A Yes.

16 Q And you addressed Dr. Ansolabehere's use of the Reock  
17 test. I can skip through this. You don't have any quarrel  
18 with using that measure for measuring compactness, the Reock  
19 test, right?

20 A A Reock test, like many of the other tests, has its own  
21 weaknesses and strengths.

22 Q Sure.

23 A And the problems you have with using the Reock test in  
24 North Carolina is that many, many of the districts cross the  
25 border of the state, including the 1st District, and that has a

1 great deal to do with the answers you get.

2 Q But in the affidavit you filed in the Mississippi  
3 redistricting litigation, you yourself relied on the Reock test  
4 to measure -- to evaluate compactness of a district, isn't that  
5 true, sir?

6 A In the Mississippi case?

7 Q Yes.

8 A I don't remember.

9 MR. HAMILTON: May I approach the witness, Your  
10 Honor?

11 BY MR. HAMILTON:

12 Q So I've handed you a copy of your deposition taken on  
13 August 10, 2012, in the *Dickson* matter. Do you recall being  
14 deposed in connection with that matter, sir?

15 A I'm sorry, could I just familiarize myself with this,  
16 please?

17 Q Sure.

18 A Okay.

19 Q Does that refresh your recollection that you used the  
20 Reock test in connection with the Mississippi litigation?

21 A Am I supposed to be reading on page --

22 Q I'm trying to shortcut this by --

23 A I told you I honestly don't remember.

24 Q Okay.

25 A Okay. I'm sorry.

1 Q And that's fine, and I don't mean to test your memory.  
2 God knows, I've forgotten many things myself, but let's just go  
3 through the transcript. It's on page 251 of the deposition  
4 taken August 10, 2012. Question, line 2:

5 "Question? The other statement that I want to  
6 ask you about is in Exhibit 429 in paragraph 5, 6,  
7 and 7. You're reporting on compactness scores, is  
8 that correct?"

9 Your answer was "Yes."

10 Question: And I want to just clarify. I think  
11 it's in the context of the affidavit. Is the Reock  
12 test the test that you were using to generate those  
13 scores?

14 Answer: I'm not sure I remember which test I  
15 used.

16 Question: Well, if you look at paragraph 4,  
17 you're talking about the Reock test.

18 Answer: Okay. Well, then probably yes.

19 Question: So the opinions you expressed in this  
20 affidavit in the Mississippi case were based on  
21 the -- on just one compactness test?

22 Answer: Yes."

23 Did I read that correctly?

24 A Yes, but I don't know what the opinions I expressed were,  
25 and I don't have the document that I was asked to talk about in

1 the deposition. So I know nothing of the context of this whole  
2 matter.

3 Q You also used the Reock test in the *Bethune* case in your  
4 testimony here, didn't you?

5 A In my testimony?

6 Q In the *Bethune* case in Virginia?

7 A In *Bethune*?

8 Q Yes.

9 A Yes.

10 Q So it's -- you're familiar with the test, and it's not an  
11 illegitimate test to measure compactness? It has its  
12 strengths; it has its weaknesses?

13 A Yes, but I think it would be fair to say that you would  
14 have to talk about what I said about using compactness tests in  
15 general and in the context of Virginia.

16 Q You don't -- we can go through the actual calculation of  
17 the Reock scores, but you don't disagree with  
18 Dr. Ansolabehere's calculation of the Reock scores from the  
19 North Carolina congressional districts, do you?

20 A When I calculated the Reock scores, I got the same scores  
21 he did. So, obviously, we're in agreement.

22 Q Okay. And you'll agree with me that both the enacted and  
23 the benchmark CD 12 has a miserable Reock score, right? That's  
24 how you would describe it?

25 A Is that what I said?

1 Q That's what you said in your first report, but I'm asking  
2 you today --

3 A No, I mean, I don't know whether I said miserable or not.

4 Q All right. Well, let's take --

5 A I will take your word for it if that's what you say I  
6 said.

7 Q Why don't you take a look at your first report,  
8 paragraph 37. It's right in front of you.

9 A Can you tell me what exhibit that is, please?

10 Q It should be a loose document.

11 MR. HAMILTON: May I assist the witness, Your Honor?

12 JUDGE OSTEN: Yes.

13 THE WITNESS: Is that D25A?

14 BY MR. HAMILTON:

15 Q Probably.

16 A Okay. Thank you.

17 Q Both enacted and benchmark CD 12 have miserable Reock  
18 scores, correct?

19 A Yes, well, the redistricting history of congressional  
20 redistricting in North Carolina has a lot of low Reock scores  
21 in the districts. And I agree with you, yes, that I said it  
22 was a miserable score, both of them.

23 Q And enacted CD 1 is even less compact than the benchmark  
24 CD 1? It dropped?

25 A In terms of the Reock test, yes.

1 Q And so is 12; it dropped?

2 A Yes.

3 Q So at least in the case of CD 12, you took a district with  
4 a miserable Reock score and made it even less compact?

5 A Marginally, yes.

6 Q Okay. Just a couple more things. Let's take --

7 A Can I -- I might add to you on that answer that one of the  
8 reasons that District 12 has a lower score as it does is  
9 because the number of square miles in the district is  
10 considerably less, and that impacts a lot on the score.

11 Q If I can direct your attention in the witness notebook to  
12 Dr. Ansolabehere's reports. It's behind Tab 17 and Tab 18, and  
13 they are Plaintiff's Exhibits 17 and 18.

14 A Yes.

15 Q You've reviewed these reports before, haven't you?

16 A Yes.

17 Q You prepared your own reports in response?

18 A Yes.

19 Q You accept the data used by Dr. Ansolabehere in these  
20 reports as accurate, isn't that true?

21 A I do now.

22 Q You did at the time of your deposition. I assume you  
23 still do?

24 A I don't.

25 Q You don't accept the data?

1 A You mean the underlying data or the --

2 Q Correct, the underlying data.

3 A The underlying data -- well, we're all operating off the  
4 same database and same geographic files, yes.

5 Q And recognizing that you disagree with Dr. Ansolabehere's  
6 conclusions, you accept that he correctly performed the  
7 analyses that he set out to do in his report, right?

8 A Well, I've looked and since then I've changed my mind  
9 about this ratio-of-area-to-perimeter district. On the face of  
10 it, it's totally illogical.

11 Q Let's put that one aside. Other than that --

12 A Okay.

13 Q -- you accept that Dr. Ansolabehere correctly performed  
14 the analyses set out in his reports, right?

15 A He made the calculations, yes. I already stated earlier  
16 today that in his envelope analysis, he used a larger envelope  
17 for -- well, he didn't use the envelopes for the districts. He  
18 combined the two envelopes which biased the scores.

19 Q Let's look at tables in Exhibit 17. Page 22 is where the  
20 tables start. Putting aside the area -- the  
21 ratio-of-area-to-perimeter test, because I know you have a  
22 concern about those, putting those aside, none of the data in  
23 these tables are inaccurate in your judgment?

24 A Once again, I have to say that as he constructed the  
25 envelope, the data that he gave for the envelope is correct.

1 What I question is what he used for the envelope.

2 Q All right. Fair enough. And if you take a look at the  
3 maps attached to Exhibit 17, and I believe they start on  
4 page 26 of Dr. Ansolabehere's report, you agree that those maps  
5 accurately depict what they purport to depict? No challenge on  
6 that score, right?

7 A I think that's true, yes. They would be much better maps  
8 if they were colored actually.

9 Q Okay. Let's look at the rebuttal report, and, again, it's  
10 at the very end. It's, I think, the second to the last page.  
11 There's a data in those reports.

12 JUDGE OSTEN: You switched to P18?

13 MR. HAMILTON: Say again?

14 JUDGE OSTEN: You switched to --

15 MR. HAMILTON: This is Plaintiff's Exhibit 18 on  
16 page 18.

17 BY MR. HAMILTON:

18 Q Those tables, one and two -- the data in the tables are  
19 accurate, as far as you know?

20 A No.

21 Q You have a concern about those?

22 A Yes, I don't think his correlations are correct. I was  
23 not able to replicate his correlations.

24 Q You didn't do any correlation analysis in either of your  
25 reports, did you?



1 A No, but that's not what you asked me.

2 Q All right. One more thing here, sir, just to finish up.

3 MR. HAMILTON: May I approach the witness, Your  
4 Honor?

5 BY MR. HAMILTON:

6 Q I'm handing you a copy of your deposition, and this is the  
7 deposition of September 8 -- I'm sorry, September 9, 2015, in  
8 this matter. This is the one that you probably heard us  
9 talking about a little earlier this morning. The question  
10 actually begins on page 21 at the bottom of the page, and the  
11 question was:

12 Question: By contrast, did you use that data to  
13 draw Congressional District 1, the voting-age  
14 population, by race?

15 Answer: To some extent, yes."

16 Next question --

17 A I'm sorry, I need to -- okay, yes.

18 Q Next question, we're on page 22, line 4:

19 Question: Did you also use the Obama 2008  
20 election results in drawing Congressional 1?"

21 Your answer was: "To some extent."

22 Question: Did you use any other election  
23 results in drawing Congressional District 1?

24 Answer: There were none others on the screen.

25 Question: And the same is true with respect to

1 Congressional 12? There were no other results other  
2 than Obama 2008?

3 Answer: You can only have one on the screen at  
4 a time."

5 And then skipping down to line 24 --

6 JUDGE COGBURN: Are you going to ask if those were  
7 his answers?

8 BY MR. HAMILTON:

9 Q Were those your answers, sir?

10 A Yes.

11 Q Line 24, page 22:

12 Question: The only election results you  
13 utilized in drawing Congressional 12 were the 2008  
14 Obama election results?

15 Answer: That's correct."

16 Was that your testimony, sir?

17 A Yes.

18 MR. HAMILTON: No further questions, Your Honor.

19 JUDGE OSTEEEN: Redirect?

20 MR. FARR: Thank you, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. FARR:

23 Q Dr. Hofeller, would you turn to this white witness  
24 notebook that counsel for the plaintiffs gave you and turn to I  
25 believe it's Plaintiff's Exhibit 700. It's the Department of

1 Justice regulations for Section 5.

2 A Yes, I have it.

3 Q Okay. I want you to turn to page 7472.

4 A Yes.

5 Q Okay. Do you see in the middle column it talks about the  
6 use of 2010 Census data?

7 A Yes.

8 Q And could you just read the first sentence into the record  
9 there.

10 A "The most current population data are used to measure both  
11 the benchmark plan and the proposed redistricting plan."

12 Q Okay.

13 MR. FARR: Now, I have a few questions about that,  
14 Your Honor, if I might approach the witness and use the charts  
15 the plaintiffs used. And could we please ask for the screen  
16 shot to be taken down.

17 JUDGE OSTEN: The what?

18 MR. FARR: The screen shot. I don't need that.

19 JUDGE COGBURN: That's all we were looking at.

20 BY MR. FARR:

21 Q Okay. I want to look at these two charts that plaintiffs'  
22 counsel showed you, Dr. Hofeller, if I don't break everything.  
23 We're going to start with the 1st Congressional District  
24 election results that plaintiffs' counsel went over with you,  
25 and what they have listed here is in this column BVAP. Do you

1 see that?

2 A Yes.

3 Q Now, do you know whether or not the BVAP that they had  
4 listed here is single race black voting-age population or any  
5 part black or total black voting-age population?

6 A Actually, I believe I asked counsel that, and he said it  
7 was any part black.

8 Q So you recall him telling you that from 2002 through 2010  
9 47.76 -- he represented to you that was any part black  
10 voting-age population?

11 A Yes, but actually the 47.76 is only a snapshot in time in  
12 the year 2000.

13 Q Okay. But my question is, other than what plaintiffs'  
14 counsel represented to you, do you know if that's single race  
15 voting-age population or any part black voting-age population?  
16 Do you have knowledge whether that's true or not?

17 A I have no knowledge except for what the counsel from --  
18 that the plaintiffs' counsel told me.

19 Q Okay. And do you know whether or not 47.76 percent they  
20 listed for the 2010 election, is that for the 2000 Census or  
21 2010 Census? Do you know?

22 A No.

23 Q Okay. He didn't tell you which census it was from, did  
24 he?

25 A That's true.

1 Q But your recollection is he represented that 47.76 was any  
2 part black voting-age population?

3 A Yes.

4 Q Okay. And he also represented for 2012 that the  
5 percentage he's listed was any part black voting-age population  
6 from the 2010 Census?

7 A Yes.

8 Q Okay. All right. And from 2002 to 2010, we're talking  
9 about the 2001 version of the 1st District?

10 A That's correct.

11 Q From 2012, we're talking about the 2011 version of the 1st  
12 District?

13 A Correct.

14 Q All right. Now, on the percent of the vote, did counsel  
15 disclose to you the actual margin of victory?

16 A No.

17 Q Okay. Did counsel disclose to you whether or not the  
18 margin of victory was less or greater than the amount by which  
19 the 1st District was underpopulated --

20 JUDGE OSTEEEN: Okay, Mr. Farr, counsel at this point  
21 is not on trial. The question is what do those statistics  
22 mean.

23 MR. FARR: Okay. Let me --

24 JUDGE OSTEEEN: I think you can ask the same question.

25 MR. FARR: Let me see if I can ask it another way.

1 BY MR. FARR:

2 Q Does this chart, Dr. Hofeller, reveal the actual margin of  
3 victory in these elections by how many votes the candidates  
4 received?

5 A None of the absolute numerical votes are on the chart.

6 Q Okay. And from this column percent of vote, can you  
7 determine whether or not the actual margin of victory for the  
8 candidate was greater or less than the amount by which the  
9 district was underpopulated?

10 A No.

11 Q Does this chart tell you anything about white turnout?

12 A Doesn't tell me about any turnout.

13 Q Black or white?

14 A That's true.

15 Q And does this chart tell you anything about how much money  
16 was spent by the candidates in any of these elections?

17 A No.

18 Q All right. Same series of questions about this chart,  
19 which --

20 MR. FARR: Your Honor, this has not been marked as an  
21 exhibit. I don't know if it should be or not.

22 JUDGE OSTEN: Is it one of the stipulated exhibits  
23 that's been sitting up over there, I think, the whole case? Do  
24 you want to mark it?

25 MR. FARR: I don't know. Is that an exhibit in --

1           MR. HAMILTON: We're having them mark the copy that  
2 is in the Court's notebook. We don't need to put these giant  
3 poster boards in. It's exactly the same thing.

4           MR. FARR: Okay. That would be fine.

5           JUDGE OSTEN: Are both -- one of them is at 1 and  
6 one is at 12? Yeah, okay. So the chart you were just  
7 referring to with respect to CD 1 is an enlargement of the  
8 chart found at Plaintiff's Exhibit 1, and the chart you're now  
9 referring to is an enlargement of the exhibit found at  
10 Plaintiff's Exhibit 12. Is that right?

11          MR. FARR: Okay.

12          MR. HAMILTON: In fact, I -- I'm sorry for the  
13 confusion.

14          JUDGE OSTEN: We'll go on the numbers again.

15          MR. HAMILTON: I don't think the numbering is right,  
16 so I think we should just assign these two documents completely  
17 new numbers at 500 and 501, or something, just to make it  
18 clear.

19          JUDGE OSTEN: Are you good with that?

20          MR. FARR: I would be fine if we could say that the  
21 chart on the 1st Congressional District is Plaintiff's  
22 Exhibit 500 and the chart on the 12th District is Plaintiff's  
23 Exhibit 501. That would be fine.

24          JUDGE OSTEN: Okay. You got that, Ms. Powell?  
25 Thank you.

1 MR. HAMILTON: Thank you.

2 BY MR. FARR:

3 Q So, Dr. Hofeller, I believe we just said this is  
4 Plaintiff's Exhibit 501, which is a chart about election  
5 results in the 12th Congressional District over the years, and  
6 I wanted to ask you, do you have any personal knowledge about  
7 whether the information that's in the column titled "Black  
8 Voting-age Population" is either single race black or any part  
9 black voting-age population?

10 A I haven't had an opportunity to check that, no.

11 Q Okay. And do you know whether or not the percentage  
12 listed in Plaintiff's Exhibit 501 for black voting-age  
13 population in 2010, is that for the 2000 Census or 2010 Census?

14 A Well, it would have to be for the 2000 Census because it's  
15 the same as the years previous.

16 Q Okay. So they didn't -- as far as you can tell, they  
17 didn't put the black voting-age population for Congressional  
18 District 12 for 2010 -- they didn't use the 2010 Census for  
19 that, based on your observations of this chart?

20 A I don't know whether they used the 2010 Census for all  
21 those numbers of 42.31 or they used the 2000 Census. So it was  
22 the 2010 census -- the 2000 Census because there's no marking  
23 on the chart to indicate which census the data came from.

24 Q Okay. So you just don't know which census this is from  
25 from just looking at this chart?



1 A That's true.

2 Q And the election results, again, we don't have the actual  
3 margins of victory on Plaintiff's Exhibit 501?

4 A That's true.

5 Q And there's nothing on this exhibit that shows how much  
6 money was spent by either candidate in these elections?

7 A No.

8 Q All right. So, Dr. Hofeller, in evaluating any efforts to  
9 redraw the 1st Congressional District in 2011, would it be  
10 pertinent or relevant to know the margins of victory of the  
11 incumbent candidate and compare that against the amount by  
12 which the district was underpopulated? Would that be a factor  
13 you would have taken into consideration?

14 A It could be, yes.

15 MR. FARR: Your Honor, may I approach?

16 JUDGE OSTEN: You may.

17 BY MR. FARR:

18 Q Dr. Hofeller, I've handed you an exhibit we've marked  
19 Defendant's Exhibit 13. Have you seen this before?

20 A Yes.

21 Q Do you know what this is?

22 A This is a legislator's guide that was put out I believe by  
23 the General Assembly staff prior to the beginning of the actual  
24 line drawing process to review some of the information needed  
25 to begin the process.

1 Q Okay.

2 A I think I remember hearing that it was, in some cases, an  
3 update of the previous document.

4 MR. HAMILTON: Objection, Your Honor, to this line of  
5 questioning. It's beyond the scope of cross-examination.

6 MR. FARR: It's not, Your Honor, because counsel has  
7 asked Dr. Hofeller whether there was any written instructions  
8 on redistricting criteria, and this, in fact, shows that there  
9 were.

10 MR. HAMILTON: That's apparently an effort to impeach  
11 his own witness. He testified, I think we went over this for  
12 maybe half an hour, that there were no written instructions  
13 with respect to the redistricting. I think I tested the  
14 Court's patience with that line of questions until we finally  
15 stopped. So I don't think it's appropriate for him to impeach  
16 his own witness. And, in any event, it's beyond the scope.

17 JUDGE OSTEN: Give me just a second.

18 (Discussion between judges.)

19 JUDGE OSTEN: Let's make it brief, Mr. Farr, but if  
20 this takes us down the road of a guide and instructions, then  
21 I'm going to reopen cross to examine -- or I know there'll be a  
22 recross anyway, but I understand your point on what you're  
23 saying, and we'll allow -- we'll grant you some latitude to  
24 address that.

25 MR. HAMILTON: Thank you, Your Honor.

1 BY MR. FARR:

2 Q So, Dr. Hofeller, do you know what this exhibit is,  
3 Defendant's Exhibit 13?

4 A Yes.

5 Q And could you explain again what it is?

6 A Again, it was really a redistricting summary, much like  
7 the one that was issued in the previous redistricting,  
8 outlining the political and legal -- mostly the legal  
9 requirements and the process itself and how it unfolds and  
10 information about how many districts are going to be drawn.  
11 It's a guide that was written by staff.

12 Q What's the publication date on this exhibit?

13 A March of 2011.

14 MR. FARR: Okay, Your Honor, I'll just let the  
15 exhibit speak for itself otherwise. So I'll move on to another  
16 exhibit.

17 JUDGE OSTEN: Hold on just a second.

18 (Discussion between judges.)

19 JUDGE OSTEN: Mr. Farr, at this point I understand  
20 your point, but he's identified it -- in terms of speaking for  
21 itself, with respect to this particular witness, I'm not real  
22 clear on the relevance of it at this point.

23 MR. FARR: Well, could I ask him another question?

24 JUDGE OSTEN: You sure can.

25 BY MR. FARR:

1 Q All right. Dr. Hofeller, go back to Exhibit D13. Have  
2 you ever seen this exhibit before? It's the legislator's guide  
3 for redistricting?

4 A Oh, I'm sorry. We're back there. Yes.

5 Q And had you reviewed that exhibit during the time frame or  
6 close to the time frame on which it was published?

7 A Yes, I read it.

8 MR. FARR: That's all, Your Honor.

9 JUDGE OSTEEEN: All right.

10 BY MR. FARR:

11 Q Now, I've just handed you Defendant's Exhibit D5.11. Do  
12 you recall during your testimony on cross-examination by  
13 plaintiffs' counsel -- if you would look to your witness  
14 notebook that plaintiffs' counsel gave you, Dr. Hofeller. Do  
15 you see this notebook?

16 A I do.

17 Q Okay. Under Tab 18 --

18 A Yes, I have it.

19 Q Excuse me, it's Tab 67.

20 A Yes.

21 Q Plaintiffs' counsel cross-examined you on one of the  
22 statements that were issued by the redistricting chairs during  
23 the course of redistricting, is that right?

24 A Yes.

25 Q He didn't question you on some of the other statements

1 that were issued by the chairs, is that correct?

2 A Yes.

3 Q And can you look at Exhibit D5.11 and tell me whether or  
4 not -- as far as you know, is that a complete set of all the  
5 statements made by the redistricting chairs during the  
6 redistricting process?

7 A I believe it is, yes.

8 Q All right. I want you to first look at the statement. It  
9 starts on the -- it's the 9th page of Exhibit D5.11, and it's a  
10 statement issued by the chairs on June, 22, 2011. If you could  
11 find that, please.

12 A June 17?

13 Q 6/22/11 is the statement.

14 A The 9th page?

15 Q Yeah. The pages, unfortunately, are not numbered. So you  
16 just have got to take the 9th page. There should be a  
17 statement there that says June 22, 2011.

18 A Up at the top right-hand corner?

19 Q Yes.

20 A Yes. Which page?

21 Q I'm trying to find it.

22 A Okay.

23 Q I want you to read a statement. Okay. I found it. Turn  
24 to page 4 of that particular statement.

25 A Yes.

1 Q Do you see the third paragraph on that page, starts with  
2 "while districts"?

3 A Yes.

4 Q Could you read that paragraph into the record, please.

5 A "While districts that adjoin minority-black districts may  
6 become more competitive for Republican candidates because of  
7 compliance with the VRA, such competitiveness results from  
8 compliance with the VRA. This in opposition of the prior  
9 legislative leadership intentionally cracking majority-black  
10 districts required by the VRA to ensure the reelection of white  
11 incumbents".

12 Q Okay. Thank you. Now, I want you to read one more  
13 statement from exhibit --

14 JUDGE GREGORY: Tell us, what does that rebut?

15 MR. FARR: Sir?

16 JUDGE GREGORY: What does that rebut?

17 MR. FARR: I'm sorry, Your Honor?

18 JUDGE GREGORY: What does that rebut?

19 MR. FARR: It's rebutting the fact that the  
20 leadership in the General Assembly never meant anything about  
21 the political impact of the plans. There was a long line of  
22 questions of Dr. Hofeller where they read one of the  
23 statements --

24 JUDGE GREGORY: Well, your witness said he didn't  
25 know anything about the intent on Guilford County in terms of

1 drawing it at a level that's higher than the existing number of  
2 blacks. So what are you rebutting from this?

3 MR. FARR: Your Honor, what I'm rebutting is that  
4 counsel was allowed to cross-examine this witness on one  
5 statement made by the legislative leaders. They didn't look at  
6 all five statements, and he did not point to the statements  
7 made by the legislative leaders stating that politics played a  
8 role in the creation of these districts.

9 JUDGE GREGORY: It looks like you haven't laid a  
10 foundation of this one that he knows about statements made by  
11 other persons anyway, but it's getting late now. That's fine.

12 MR. FARR: Thank you, Your Honor.

13 BY MR. FARR:

14 Q Dr. Hofeller, I want you to turn to the last statement by  
15 the congressional leaders -- or the legislative leaders. It's  
16 dated July 19, 2011.

17 A Yes, I have it.

18 Q All right. Could you turn to page 4 of that statement?

19 A Yes.

20 Q Okay. Could you -- would you go down to the first  
21 sentence in the third line from the bottom and read the rest of  
22 that statement -- rest of that paragraph into the record?

23 MR. HAMILTON: Objection, Your Honor, there's no  
24 foundation that this witness has ever read or seen this  
25 document before, and he's not the author since we know -- or at

1 least it hasn't been established that he's the author. So  
2 we're just reading a document he doesn't have anything to do  
3 with into the record, and I don't think that's an appropriate  
4 use of this document.

5 JUDGE OSTEEEN: Didn't you do the same thing with the  
6 other document, the public statement, the July public statement  
7 that we had the discussion about, didn't know if it was the  
8 first map and so on?

9 I mean, this is in the record, and we can read this.  
10 So let's just make it -- during direct, there was comment on  
11 Rucho and Lewis public statements. Now we're getting -- kind  
12 of going down the road a little bit. We're capable of sorting  
13 that out. Let's quickly wrap this up.

14 Where were you, Mr. Farr? I am going to overrule --  
15 well, hold on a second.

16 (Discussion between judges.)

17 JUDGE OSTEEEN: I'll tell you what. If you'll just  
18 identify it again. We don't need it read again. Just identify  
19 what you wanted him to look at.

20 MR. FARR: Okay. Thank you, Your Honor.

21 JUDGE OSTEEEN: It's D511. It's the 7/19/2011 public  
22 statement, page --

23 MR. FARR: It's pages 4 and 5. May I just read the  
24 sentence and ask him a question, Your Honor?

25 JUDGE OSTEEEN: You may.



1 BY MR. FARR:

2 Q The last sentence in this statement, Dr. Hofeller, says:  
3 "By continuing to maintain this district as a very strong  
4 Democratic district, we understand the districts adjoining the  
5 12th District will be more competitive for Republican  
6 candidates."

7 Now, is that statement consistent with the  
8 instructions you received from the redistricting cochairs?

9 A Yes.

10 MR. FARR: No further questions, Your Honor.

11 JUDGE OSTEEEN: Mr. Hamilton?

12 MR. HAMILTON: No recross, Your Honor.

13 JUDGE OSTEEEN: All right. You may step down.

14 THE WITNESS: Thank you, Your Honor.

15 (At 2:28 p.m., witness excused.)

16 MR. FARR: Your Honor, could we just have two minutes  
17 to go to the back of the courtroom because we may have a  
18 proposal for shortening the rest of the proceeding? Can we  
19 just consult with our client for a second, and then we'll come  
20 back?

21 JUDGE OSTEEEN: We're going to take a 5-minute recess.

22 (At 2:29 p.m., break taken.)

23 (At 2:36 p.m., break concluded.)

24 MR. FARR: Your Honor, given where we stand in  
25 today's proceedings, we were going to call Senator Rucho and

1 Representative Samuelson to give their version of the  
2 conversation with Representative Watt. They have already given  
3 that testimony in the *Dickson* case. So we're just going to  
4 submit their testimony in the *Dickson* on that issue and will  
5 not be calling them as a witness.

6 JUDGE OSTEEEN: Any objection to our consideration of  
7 that testimony?

8 MR. HAMILTON: No objection, Your Honor.

9 MR. FARR: And --

10 JUDGE OSTEEEN: Hold on just a second. All right.  
11 Yes, sir?

12 MR. FARR: Your Honor, we would like to submit an  
13 exhibit to the Court that relates to the email where we were  
14 having the attorney-client privilege issue discussion. It's  
15 the deposition transcript from the deposition where this  
16 exhibit came up. I would just like -- we don't have to argue  
17 that at the moment.

18 JUDGE OSTEEEN: Let me see where we are on the  
19 evidence. Will there be any additional evidence -- or  
20 witnesses called by the defense?

21 MR. FARR: No, Your Honor. That's it.

22 JUDGE OSTEEEN: Okay. So we're getting the  
23 straightening out exhibits. All right. So you've got the  
24 deposition testimony you want to submit in relation to the --  
25 where is that motion now?

1           MR. HAMILTON: To be clear, I don't mean to  
2 interrupt, we have a very, very short rebuttal.

3           JUDGE OSTEEEN: Right. I am going to get all the  
4 exhibits straightened out, and then we'll hear from your -- if  
5 you have rebuttal evidence, we'll take it then.

6           MR. FARR: Your Honor, I have a copy of the  
7 plaintiff's exhibit attached to the transcript, Plaintiff's  
8 Exhibit 564. Is that right?

9           MR. HAMILTON: That was --

10          MR. FARR: The document we're contesting about  
11 attorney-client privilege.

12          MR. HAMILTON: That's right.

13          MR. FARR: So I've got their exhibit and the  
14 deposition transcript. We've marked the deposition transcript  
15 as Defendant's Exhibit 131, and I'd just like to hand that up  
16 to the Court.

17          JUDGE OSTEEEN: Okay. That's with respect to  
18 Plaintiff's Exhibit 13, or is that the --

19          MR. HAMILTON: That's correct, Your Honor.

20          JUDGE OSTEEEN: Okay.

21          MR. HAMILTON: Exhibit 564 is Plaintiff's Exhibit 13.

22          MR. FARR: Oh, okay, I'm sorry. 564 is the *Dickson*  
23 deposition sticker. May I hand it up?

24          JUDGE OSTEEEN: Yes. And you'd like us to consider  
25 that in relation to their efforts to admit that exhibit?

1 MR. FARR: Yes, Your Honor.

2 JUDGE OSTEEEN: Okay.

3 MR. HAMILTON: Now, Your Honor, Mr. Strach, when  
4 appropriate, would like to move all our exhibits into evidence  
5 at this point in time.

6 JUDGE OSTEEEN: All right. Mr. Strach, I don't know  
7 how you intend to do this, but we'll do it in such a fashion as  
8 to communicate effectively to Ms. Powell.

9 MR. STRACH: I'm going to try, Your Honor. What I  
10 was going to do -- I think that both parties agree with this,  
11 but at Docket Entry 95, a lot of materials from the *Dickson*  
12 case were filed with this Court and then additional materials  
13 were sent to the Court on a CD. And, Your Honor, we were going  
14 to move into admission into the trial record all the  
15 information that was filed. I'll give you the docket entry  
16 number.

17 JUDGE OSTEEEN: All right.

18 MR. STRACH: It's Docket Entry 95, filed July 1,  
19 2015. I'm going to call it plaintiffs' and defendant's joint  
20 notice of filing the state court record in *Dickson v. Rucho*.  
21 Your Honor, that contained the record on appeal in the North  
22 Carolina Supreme Court in the *Dickson* case. That case number  
23 in the North Carolina Supreme Court is No. 201PA12-2, and that  
24 filing included the record on appeal and what are called the  
25 Rule 9D exhibits and materials that were also filed with the

1 state supreme court.

2 JUDGE OSTEEEN: All right. And in terms of  
3 plaintiffs, no objection to our accepting those?

4 MR. HAMILTON: No objection, Your Honor.

5 JUDGE OSTEEEN: All right.

6 MR. STRACH: And, Your Honor, to the extent not  
7 covered by the above, we're going to move in -- we're going to  
8 move to admit our specific exhibits that we've presented and  
9 prepared for use at trial. Defendants -- we would move in  
10 Defendant's Exhibits 1 through 122. Your Honor, to our  
11 knowledge those -- none of those are -- well, some of them are  
12 objected to, but they were all disclosed, and we're going to  
13 ask to move in Defendant's Exhibit 1 through 122, including all  
14 the subparts and A versions of those exhibits.

15 Your Honor, if it's okay, I'll highlight some of the  
16 objections. There's a few --

17 JUDGE OSTEEEN: All right. Let me -- let me get the  
18 numbers. Are there any other numbered exhibits, or do 1  
19 through 122 take care of everything?

20 MR. STRACH: No, 1 through 122 will take care of all  
21 the exhibits that were disclosed pretrial.

22 JUDGE OSTEEEN: Okay.

23 MR. STRACH: Then we have Defendant's Exhibits 124  
24 through 131 -- I'm sorry, let me read these out. Defendant's  
25 Exhibit 124, which is a comparison chart of the 2011/2001

1 enacted plans for the 1st District. Defendant 126, that's the  
2 historical congressional maps binder. D128, which is the  
3 Michigan Law Review article regarding compactness. D129, which  
4 is Appendix 1 to the Tom Hofeller resume. D130, which is the  
5 third affidavit of Tom Hofeller in the *Dickson v. Rucho* case.  
6 D131, which are depo excerpts from the Tom Hofeller deposition  
7 in *Dickson v Rucho*.

8 JUDGE OSTEEEN: Then we have 500 -- or you may be  
9 getting there. Those are Plaintiff's Exhibits 500 and 501.

10 MR. STRACH: And then finally, Your Honor, I would  
11 just note the plaintiffs yesterday moved in four of our  
12 exhibits that, just for the record, I'll state what those were.  
13 Those were Defendant's 5.11, Defendant's Exhibit 30,  
14 Defendant's Exhibit 19, and Defendant's Exhibit 118.

15 JUDGE OSTEEEN: Okay. All right. So 1 through 122.  
16 I don't recall there being any objection to the 124, -6, -8,  
17 -9, -30, and -31. Am I right about that?

18 MR. HAMILTON: There is a pending objection to  
19 Exhibit 121.

20 JUDGE OSTEEEN: Right, but that's in that second --  
21 the second group, 124 --

22 MR. STRACH: No, Your Honor, that's in the first  
23 group. 121?

24 JUDGE OSTEEEN: He said 121, but right now, I'm just  
25 talking about that second batch of numbers: 124, -6, -8, 129,

1 -30, and -31. I think I remember those exhibits. I don't  
2 think there's any objection to those.

3 MR. HAMILTON: If the Court would give me just a  
4 moment to --

5 JUDGE OSTEN: I'm going backwards on you. Sorry  
6 about that.

7 MR. HAMILTON: That's all right. It's not a problem.  
8 So we have no objection to Exhibit 124.

9 JUDGE OSTEN: Okay.

10 MR. HAMILTON: I think that's right. We do object to  
11 Exhibit 124, I'm sorry. Your Honor, this is the one where we  
12 have no objection to the top box --

13 JUDGE OSTEN: Okay. So there is --

14 MR. HAMILTON: -- but we do have a continuing  
15 objection to the bottom two boxes, the bottom two-thirds of  
16 that document, which was not produced before. So that's  
17 Exhibit 124. 126, the map binder, we have no objection to. I  
18 love reading the Michigan Law Review, so we have no objection  
19 to Exhibit 128.

20 JUDGE OSTEN: Tip of the hat to Judge Gregory?

21 MR. HAMILTON: 129 is the appendix of the Hofeller  
22 CV. So that's fine. No objection there. No objection to  
23 either 130 or 131.

24 JUDGE OSTEN: Okay. So that leaves us with 124,  
25 which we're going to take a little closer look at. So that

1 leaves us 1 through 122.

2 MR. HAMILTON: And the only objection there, Your  
3 Honor, is Exhibit 121.

4 JUDGE OSTEEEN: And what was 121?

5 MR. HAMILTON: It was an analysis by Dr. Barry  
6 Burden, I believe, and it was a document -- our primary  
7 objection aside from hearsay is that it's irrelevant. It was a  
8 document prepared long after these maps were drawn, and it has  
9 no relevance to the issue --

10 JUDGE OSTEEEN: Is that the one you withdrew your  
11 objection on and then it turned out it had been prepared two  
12 weeks ago, or something like that?

13 MR. HAMILTON: No.

14 JUDGE OSTEEEN: Okay. All right. Let's just for  
15 purposes -- then I'll admit Documents 1 through 120,  
16 Document 122, Documents 126, 128, 129, 130, and 131, all  
17 defendant exhibits. I'll note the objection right now to 124.  
18 We'll take that one under advisement. And with respect to  
19 Exhibit 121, again, we will take that under advisement. I'll  
20 simply note for the record that Defendant's Exhibits 11, 30,  
21 19, and 118 are admitted in both cases.

22 MR. STRACH: All right. Then I have just one other  
23 thing, Your Honor. We would like to go ahead and formally move  
24 admission of our deposition counter-designations, just to be on  
25 the safe side. Those were filed at Docket Entry 117 on



1 September 28, 2015.

2 JUDGE OSTEEEN: Let me see. Have you all looked at  
3 them? Are there any objections to the counter-designations?

4 MR. HAMILTON: No, Your Honor. I think we can  
5 jointly move the admission of the designations plus the  
6 counter-designations.

7 JUDGE OSTEEEN: All right. And that's Document 117 is  
8 where those were found?

9 MR. STRACH: Ours are Docket 117. I'm not sure where  
10 the plaintiffs are.

11 MR. HAMILTON: I'm afraid, as I stand here, I can't  
12 recite the docket numbers.

13 JUDGE OSTEEEN: Well, we will -- to the extent the  
14 plaintiffs' pretrial disclosures include -- included deposition  
15 counter-designations, we'll allow those as part of the record.

16 MR. HAMILTON: Thank you, Your Honor.

17 MR. STRACH: Thank you, Your Honor. That's all we  
18 have.

19 JUDGE OSTEEEN: All right. We still have obviously,  
20 just to be clear, issues remaining with respect to plaintiff --  
21 in addition to what I just described, issues remaining with  
22 respect to Plaintiff's Exhibit 13, which we will resolve later.  
23 We have the Hofeller testimony, including Defendant's  
24 Exhibit 124, which was objected to on the basis of not  
25 disclosed -- properly disclosed as part of the expert

1 testimony. And then we have objections outlined in both of the  
2 motions in limine, which I think are still under advisement at  
3 this point.

4 All right. So that -- does that take -- anything I  
5 need to be aware of?

6 JUDGE COGBURN: Do we have the charts in? That's 500  
7 and 501.

8 MR. HAMILTON: Those have not been admitted yet, Your  
9 Honor. As soon as we have an opportunity to present our  
10 rebuttal case, I was going to offer those.

11 JUDGE OSTEEEN: Defendant's Exhibit 121, there is an  
12 objection. Refresh my -- maybe we can get this resolved. For  
13 what -- I can't remember where 121 came up. Do you remember  
14 where that one was presented?

15 MR. HAMILTON: It didn't, Your Honor. There was no  
16 witness that discussed it. It was simply part of the mass of  
17 documents that's to the right of the Court.

18 JUDGE OSTEEEN: It's listed as an expert report by  
19 Barry Burden, Ph.D, that was submitted with NAACP versus  
20 McCrory, et al.

21 MR. FARR: Yes, Your Honor, that was a public  
22 document. There's a docket entry number for it in the United  
23 States versus North Carolina lawsuit that was tried in front of  
24 Judge Schroeder. We can provide that docket entry, and that  
25 was -- we offered that because Dr. Burden gave testimony in

1 that case and a report that racially polarized voting is still  
2 very strong and prevalent in the state of North Carolina.

3 MR. HAMILTON: And, Your Honor, Dr. Burden testified  
4 in a different case, not the state case, a whole different --  
5 and he was never disclosed as an expert in this case, never  
6 deposed. It's simply not a relevant exhibit in this case for  
7 that proposition. So, your Honor, we would object to its  
8 admission.

9 JUDGE OSTEEEN: All right. I am going to -- I'll  
10 simply leave -- take it -- it is an expert report. If it  
11 wasn't disclosed -- I understand it's part of the public record  
12 in another case. That doesn't immediately make it relevant or  
13 admissible in this case. I will leave you with this,  
14 Mr. Farr -- well, let me see.

15 (Discussion between judges.)

16 JUDGE OSTEEEN: Mr. Farr, at this point, it's an  
17 expert report; and if it wasn't part of the disclosures, I  
18 don't find it's admissible. But if you're taking aback -- if  
19 that comes as something of a surprise -- well, let me back up.  
20 It's not admissible because, as an expert report, it wasn't  
21 part of the disclosures in this case, but I'll give you a  
22 couple of days -- or not I -- the Court will give you a couple  
23 of days if you want to submit something before we get started  
24 that you think should convince us otherwise.

25 MR. FARR: That will be fine, Your Honor. Thank you

1 very much.

2 JUDGE OSTEEEN: All right. All right then. The  
3 plaintiffs have rebuttal evidence?

4 MR. HAMILTON: We do, Your Honor. At this point --  
5 maybe we'll do this in reverse order and offer Exhibits 500 and  
6 501. Those are the two big election tables that we had.

7 JUDGE OSTEEEN: All right. Are they plaintiff's  
8 exhibits?

9 MR. HAMILTON: I think they're Plaintiff's  
10 Exhibit 500 and 501.

11 JUDGE OSTEEEN: Plaintiff's Exhibits 500 and 501,  
12 which is enlargements of exhibits appearing in the Hofeller  
13 notebook at Tabs 1 and 12, are admitted.

14 MR. HAMILTON: Thank you. Then we would also offer  
15 Exhibit 700, which is the excerpt from the Federal Register.  
16 It's the very last tab in the page, and, of course --

17 JUDGE OSTEEEN: Any objection to that?

18 MR. HAMILTON: -- the Court can find it in the  
19 Federal Register, but this, I thought, would be convenient.

20 JUDGE OSTEEEN: I would prefer not to have go looking.  
21 Thank you.

22 MR. FARR: No objection, Your Honor.

23 JUDGE OSTEEEN: All right. Then the exhibit labeled  
24 in the Hofeller notebook as Tab 700, the Federal Register  
25 excerpt, is admitted.

1           MR. HAMILTON: Thank you. We just have less than 10  
2 minutes with Dr. Ansolabehere.

3           JUDGE OSTEN: All right.

4           MR. HAMILTON: Doctor?

5           JUDGE OSTEN: Doctor, since there's been a break in  
6 your testimony, I won't have you re-sworn, but I will remind  
7 you you are still under oath in this proceeding.

8           THE WITNESS: Thank you.

9                         STEPHEN DANIEL ANSOLABEHERE,  
10                        PLAINTIFF'S WITNESS, PREVIOUSLY SWORN  
11                         DIRECT EXAMINATION

12 BY MR. HAMILTON:

13 Q       Good afternoon, Doctor. Do you have the Stephen  
14 Ansolabehere notebook there next to you?

15 A       I do.

16 Q       Okay. If you could turn to your first report and to the  
17 table that calculates the area-to-perimeter-ratio calculation  
18 that we've been talking about. I believe it's page 22 of  
19 Plaintiff's Exhibit 17, Table 1. Do you have that there in  
20 front of you?

21 A       I do.

22 Q       So can you explain -- and then there's some -- there was  
23 some testimony in the defendants' case from Dr. Hofeller about  
24 his confusion over how the numbers were calculated here. Can  
25 you explain?

1 A Again, as I mentioned yesterday, this came from ArcGIS,  
2 which is basic software for mapmaking, and the question came up  
3 yesterday about what the units were. Last night, I confirmed  
4 what the units are. These are actually square meters per  
5 kilometer. That's what ArcGIS area calculation is in. So this  
6 is square meters per kilometer, which I misspoke and said miles  
7 yesterday.

8 Q And why is it that it calculates it in square meters  
9 rather than in miles?

10 A It's just a lot of software is in the metric standard  
11 because it's used internationally.

12 Q All right. Now, Dr. Hofeller also had some opinions on  
13 your envelope analysis, the analysis of the counties around the  
14 CD 1 and CD 12 that you analyzed during the course of your  
15 expert testimony. Do you recall that --

16 A I do.

17 Q -- analysis? And, first of all, was this the subject of  
18 any of Dr. Hofeller's expert reports?

19 A I don't recall reading anything in his expert reports  
20 critiquing my definition of the envelope or my envelope  
21 analysis.

22 Q Okay. So this is the first time you've heard this  
23 criticism from Dr. Hofeller?

24 A Correct.

25 Q Okay. So -- and what's the answer? I mean, why is it --

1 why -- I believe Dr. Hofeller testified that it introduces bias  
2 into the analysis if you include both the counties that were  
3 touched by the benchmark plan and by the enacted plan. Is  
4 Dr. Hofeller correct on that?

5 A No.

6 Q And can you explain why?

7 A The concept here is like the analysis with Voting  
8 Tabulation Districts. The analysis of the counties is --  
9 they're a definition of where the district is located, where  
10 the state legislature chose to locate the district; in which  
11 counties, that's a broad definition of the area; or in which  
12 VTDs, under the old map or the new map, and that's explained in  
13 the report.

14 So the concept for the county envelope is all the  
15 counties in which it was placed under the old map or the new  
16 map and where the boundaries happen to go within that envelope.  
17 Same with Voting Tabulation Districts. So all the Voting  
18 Tabulation Districts in which -- or for which the legislature  
19 under one map or the other had the boundary of the district.

20 Q And Dr. Hofeller suggested that the appropriate way to  
21 look at this is only benchmark alone or for enacted plan alone.  
22 Do you agree with that?

23 A No, I disagree.

24 Q Okay. And what would be wrong with doing it that way, or  
25 would it?

1 A The problem is you'd be kind of comparing apples and  
2 oranges if you followed the approach that he had suggested on  
3 the stand because you would be actually shifting the baseline  
4 of what the area of comparison is. You'd be saying, well, it  
5 was in this region in that time and in this region in that  
6 time. If they were in different regions, that would be fine,  
7 but that would be more like a renumbering of the districts.  
8 But this district is roughly located in this region. The broad  
9 stroke definition is all the counties in which it appeared in  
10 either version of the map, and the narrowly defined definition  
11 is all the VTDs in which it was defined in one version of the  
12 map.

13 MR. HAMILTON: Thank you. No further questions, Your  
14 Honor.

15 JUDGE OSTEN: Cross-examination?

16 CROSS-EXAMINATION

17 BY MR. FARR:

18 Q Doctor, in your report, did you disclose that you had used  
19 all the counties in both the 2001 and the 2011 1st District as  
20 your envelope?

21 A My writing of it was that -- my understanding, the way I  
22 read the words as I wrote them. If it wasn't clear, nobody  
23 asked me a question to clarify that.

24 Q Okay. Did you take a look at how the envelope would look  
25 for CD 1 if you only looked at the counties that were CD 1 in



1 2001?

2 A No, because that would -- I'm looking at the region where  
3 the district is located under either map, and that would be  
4 kind of part of the definition of the region, not my entire  
5 definition of the region.

6 Q But if you had been wanting to see -- you used the term  
7 "racial sorting" several times. If you wanted to see the  
8 racial sorting, as you described it, that was done by the  
9 individuals who supported and voted for the 2001 1st  
10 Congressional District, wouldn't it have been appropriate to  
11 look at the county in which that district was located?

12 A If I was just looking at one district in one cycle without  
13 comparison with other districts, the only information I'd have  
14 to define the region would be just that set of counties. I  
15 think that's what the question is asking, is that right?

16 Q You're saying that if you had done this in 2001, you would  
17 have looked at the -- as the envelope for the 2001  
18 Congressional District 1, you would have looked at the counties  
19 in which it was actually located?

20 A In '97 and in 2001.

21 Q Right. You wouldn't have included Durham County in that?

22 A If I was -- in that context, that was how I would define  
23 it, but the legis -- definition of which county is which  
24 counties the legislature chose to locate the map under both  
25 versions of the plan.

1 Q Okay. Now, you have another chart in one of your reports  
2 where you talk about the population in Durham County, the total  
3 population and the African-American population?

4 A Correct.

5 Q Is it fair to say that in all the counties that were  
6 either in the first -- the 2011 1st District or the 2011 1st  
7 District, that Durham is the most populous county?

8 A I don't have the population statistics in front of me, but  
9 it might be.

10 Q You wouldn't --

11 A I don't recall.

12 Q You don't recall that. Okay. Was Durham County -- do you  
13 know enough to know whether or not the total population and the  
14 black population in Durham County is one of the higher  
15 population totals amongst all the counties that would be in  
16 either the 2001 or the 2011 1st District?

17 A I would have to look at the data to make that analysis.

18 Q So you have no idea?

19 A I know in the report I report, you know, what the total  
20 populations are and what percentage is Durham County. This is  
21 in Exhibit 18, my response report. So what percentage of the  
22 population from Durham County is put in CD 1 and what the black  
23 percentage of that -- of the county is that was put in CD 1  
24 versus the white percentage of the population that was not or  
25 was.

1 Q But you couldn't say whether or not Durham County was one  
2 of the more -- had one of the larger populations of the  
3 counties in the 1st District --

4 A I did not do a comparison county by county of the  
5 populations.

6 MR. FARR: That's all, Your Honor. Thank you.

7 JUDGE OSTEN: Anything in response to that?

8 MR. HAMILTON: No redirect, Your Honor.

9 JUDGE OSTEN: All right. Dr. Ansolabehere, you may  
10 step down. Thank you.

11 (At 3:02 p.m., witness excused.)

12 JUDGE OSTEN: Further evidence, Mr. Hamilton?

13 MR. HAMILTON: No further evidence, Your Honor.

14 Plaintiffs rest.

15 (Discussion between judges.)

16 JUDGE OSTEN: Mr. Farr, let me ask you one question  
17 with respect to Plaintiff's Exhibit 13, which is the email and  
18 attorney-client privilege that's been asserted. There was an  
19 assertion made, and we're not -- or at least I'm not clear on  
20 the response that this document was later filed by the  
21 defendants as part of the record in the Supreme Court. Is that  
22 correct or incorrect, or we're not sure about that at this  
23 point?

24 MR. FARR: Your Honor, I don't know. It's possible  
25 that that happened as part of a joint filing. I'm sure that we

1 did not file it on our own; and, honestly, I had forgotten that  
2 the exhibit existed until I saw it today.

3           There was a massive filing in the *Dickson* case, as  
4 there was in this case, but, basically, we agreed to throw the  
5 whole kitchen sink into the record before the North Carolina  
6 Supreme Court; and our argument would be that under Rule 26,  
7 either if you look at the state rule or the federal rule, once  
8 we objected to that document and claimed that it was  
9 privileged, it should have been returned to us, destroyed,  
10 sequestered. Those are the rule -- the terms that are used in  
11 Rule 26, and that was the obligation of the plaintiffs to do  
12 that.

13           And I plead guilty, Your Honor, if it was jointly  
14 filed with, you know, 500,000 other pages of paper, then I  
15 didn't catch that. If that constitutes a waiver, then we waive  
16 it. But I really do believe, Your Honor, the thing shouldn't  
17 even have been in the record because the plaintiffs owed us an  
18 obligation under Rule 26 to hand the thing back to us or  
19 destroy it or retrieve it or seek a ruling from the Court on  
20 whether it was privileged.

21           JUDGE OSTEEEN: Well, what I'm inclined to do is just  
22 keep it under advisement; but if there's nothing filed to  
23 suggest contrary to what's been asserted, that it was filed by  
24 the defendants in the Supreme Court or as part of a record,  
25 then we'll proceed ahead on that finding. Yes, sir, Mr. Speas?

1           MR. SPEAS: Your Honor, if I could just clarify. The  
2 documents were filed in the trial court by the defendants. The  
3 documents, as filed in the trial court by the defendants,  
4 included Exhibit 13. When the appeal was filed, the parties  
5 jointly filed the record on appeal.

6           JUDGE OSTEEEN: Okay. So it was the first filing that  
7 you contend in the trial court?

8           MR. SPEAS: Yes.

9           JUDGE OSTEEEN: Take a look at that and check it out  
10 pretty quickly.

11          MR. FARR: Your Honor, can we have overnight to look  
12 at that and respond?

13          JUDGE OSTEEEN: Yeah, I mean, I didn't expect it  
14 today, but we gave you until I think maybe Monday to respond to  
15 the other thing, whatever it was, and so same time frame for  
16 this in terms of verifying the facts.

17          MR. FARR: All right. We'll find out for sure, Your  
18 Honor; and as I said, if we filed it, which I have no idea  
19 whether we did or we didn't with lots of other things, then I  
20 guess we waived it.

21          JUDGE OSTEEEN: Judge Gregory has got a question.

22          JUDGE GREGORY: I have one question, counsel. Assume  
23 just for the sake of argument you get past waiver.

24          MR. FARR: I'm sorry, Your Honor?

25          JUDGE GREGORY: Assume for the sake of argument right

1 now that you get beyond the question of waiver. You propose  
2 that this is attorney-client privilege?

3 MR. FARR: Yes, sir, I sure do.

4 JUDGE GREGORY: And you hired the expert in this  
5 case?

6 MR. FARR: Yes.

7 JUDGE GREGORY: And there's an old term, I guess I'm  
8 sort of a dinosaur, but we call it a res gestae. You're part  
9 of the res gestae of this case, the most important part, right?  
10 Weren't you engaged before any drawings were done?

11 MR. FARR: Yes, Your Honor.

12 JUDGE GREGORY: And you actually hired the expert  
13 before the drawings were done?

14 MR. FARR: I did.

15 JUDGE GREGORY: So if the question comes up as to  
16 whether instructions were given, are you claiming that you can  
17 raise the attorney-client privilege if we ask whether  
18 instructions were given through you for the drawing of these  
19 plans?

20 MR. FARR: I don't think there's anything in that  
21 email about instructions, Your Honor, and I do think there is  
22 an argument that discussions between counsel and expert  
23 witnesses under the new Rule 26 are protected from discovery.

24 JUDGE GREGORY: Yeah, they're normally in a different  
25 context than this, though. But, anyway, I just put that on

1 notice on that question to you.

2 MR. FARR: All right. Thank you very much.

3 JUDGE OSTEEEN: All right. So here is what we're  
4 going to do. We're going to -- I need about 15 minutes to kind  
5 of get things in place for arguments.

6 Arguments, roughly speaking, if you don't get any  
7 questions, then you ought to target -- we'll say 20 minutes,  
8 but if -- I would say it's reasonably likely both sides may  
9 receive some questions. We don't have a red, green, or yellow  
10 light here, so we won't cut anybody off right at 20 or 25  
11 minutes; but I can assure you that at about 30 minutes, we  
12 won't be listening to you much anymore. I mean that with all  
13 due respect to both sides. You've still got findings of fact  
14 and conclusions of law that are going to be presented. So  
15 there will be plenty of opportunity to close out this case.

16 So, roughly speaking, target 20 to 30 minutes for  
17 your arguments. We will, I think, try to stop promptly at the  
18 30-minute mark, which I think is plenty of time, given the  
19 briefing that has transpired and will transpire in relation to  
20 the findings of fact.

21 Any questions about that? Mr. Hamilton?

22 MR. HAMILTON: No, Your Honor, no questions.

23 JUDGE OSTEEEN: Mr. Farr?

24 MR. FARR: No, Your Honor.

25 JUDGE OSTEEEN: Do you all anticipate dividing your

1 argument at all, or will one lawyer for both sides handle it?

2 MR. HAMILTON: From the plaintiffs, I'll be  
3 presenting the closing argument.

4 MR. FARR: I'll be doing it for the defendants, Your  
5 Honor. I hope to not be up here for 20 minutes. I think we  
6 filed a brief, and you're getting findings of facts from us,  
7 and I also think the arguments are pretty plain from the way  
8 the evidence came out.

9 JUDGE OSTEEEN: That sounds good. We'll be in recess  
10 for 15 minutes.

11 (At 3:10 p.m., break taken.)

12 (At 3:32 p.m., break concluded.)

13 JUDGE OSTEEEN: All right. Closing arguments?  
14 Mr. Hamilton, are the plaintiffs ready to proceed?

15 MR. HAMILTON: We are, Your Honor.

16 JUDGE OSTEEEN: All right. You may do so.

17 MR. HAMILTON: Good afternoon, Your Honors. Let me  
18 start by thanking the Court on behalf of all the lawyers  
19 appearing before you today on behalf of the plaintiffs for your  
20 courtesy and patience over the course of the last week. It has  
21 been an honor and pleasure to appear before you, and I thank  
22 you for that.

23 There's been a lot of evidence presented over the  
24 last few days, but the case before you boils down to a very  
25 simple proposition. May North Carolina's General Assembly



1 purposely transform North Carolina's 1st and 12th Congressional  
2 District into 50 percent black voting-age population districts  
3 when African-American voters in both of these districts had  
4 already been electing their candidates of choice without fail  
5 for 20 years? The answer to this question has been addressed  
6 and definitively settled by the United States Supreme Court in  
7 its recent *Alabama* decision, which unambiguously condemned the  
8 kind of misguided interpretation of the Voting Rights Act we've  
9 seen here.

10           What the State did was turn the Voting Rights Act on  
11 its very head. The record showed that over the last 20 years  
12 voters were joining together and voting across racial lines in  
13 these two districts, and the result was that African-American  
14 candidates of choice were winning elections, not just some of  
15 the time, but all of the time.

16           The Voting Rights Act was designed to break down  
17 barriers to equal participation in the political process. It  
18 was designed to encourage just this kind of -- just this kind  
19 of state of affairs where voters vote for candidates based on  
20 the content of their policies and not the color of their skin.

21           The Voting Rights Act most certainly was not designed  
22 to require a State to segregate African-Americans into majority  
23 and minority districts whenever possible. The very idea is  
24 repugnant to everything the Civil Rights Movement fought for  
25 and everything the statute stands for.

1           So the first question before the Court is whether  
2 race predominated in the drawing of these two districts.  
3 That's the key inquiry of predominance, and, here, that's  
4 really easy because they told us. This is a direct evidence  
5 case. It's not a circumstantial evidence case. It's not the  
6 kind of case you need to look at district shapes or really  
7 weigh compactness and try to decipher what they're up to  
8 because they told us. They told us what they were doing and  
9 why when they drew these two congressional districts, just like  
10 Alabama did in the *Alabama* case.

11           Now, there's plenty of circumstantial evidence as  
12 well, all of which just confirms what the legislature was up to  
13 and told us outright. So let's perhaps start with the direct  
14 evidence.

15           It's clear and undisputed that Senator Rucho and  
16 Representative Lewis, the map drawers, or those controlling the  
17 map drawers, believed that compliance with the Voting Rights  
18 Act required them to consider race when drawing CD 1 and CD 12.  
19 That means that the General Assembly used -- the means that  
20 they used to that end was a 50 percent black voting-age  
21 population.

22           JUDGE OSTEEEN: Walk me through what you contend is  
23 the direct evidence with respect to CD 12.

24           MR. HAMILTON: CD 12 -- and we've put it up here on  
25 the board. The evidence is -- well, first of all, we can look

1 at the black voting-age population. It changed more  
2 dramatically than CD 1. It went 43.8 percent all the way up to  
3 50.7 percent. At the time, in the public statement Senator  
4 Rucho and Representative Lewis stated that, quote, because of  
5 the presence of Guilford County in the 12th District, we've  
6 drawn our proposed 12th District at a black voting-age level  
7 that's above the percentage of the black voting-age population  
8 found in the current 12th District. That's Plaintiff's  
9 Exhibit 67.

10 Now, it's instructive to compare that statement with  
11 the facts in the *Alabama* case. In *Alabama*, the problem was  
12 that the General Assembly there, the legislature in *Alabama*,  
13 said their view of retrogression is you've got to keep the  
14 black voting-age population where it is or higher, but it can't  
15 ever drop below, and the Supreme Court emphatically rejected  
16 that and said that mechanical, numerical view is inconsistent.

17 And part of the reason we've put the Department of  
18 Justice regulations into evidence, it's a little odd, but it's  
19 important. This is a functional analysis. As the Supreme  
20 Court said in *Alabama*, they asked the wrong question.

21 JUDGE OSTEN: Well, how do you equate what Rucho and  
22 Lewis said about the map in their public statement and what the  
23 map drawer said in terms of "I was instructed to make the  
24 neighboring districts heavily or more strongly Republican but  
25 race was not a factor"?

1           MR. HAMILTON: There are two responses to that, Your  
2 Honor. First, we have Dr. Ansolabehere's testimony and  
3 analysis of both the VTDs and then the larger county areas  
4 where it clearly shows clear evidence --

5           JUDGE OSTEN: That's the opinion circumstantial  
6 evidence. We're on direct.

7           MR. HAMILTON: That's right. And then, in addition,  
8 there was use of the Obama 2008 Presidential Election, which  
9 correlates very closely with registered black voters, and, in  
10 fact, again, we put that evidence up on the board here.

11           The correlation -- the idea that you're going to take  
12 a singular unique event in American history, the first  
13 African-American candidate nominated for president from either  
14 major party, and suggest that that's not related to race, that  
15 doesn't pass the straight-face test, with all due respect. It  
16 is -- of course, that had an influence on the way voters voted,  
17 and it had a very close correlation between the location of  
18 registered voters, African-American registered voters, and the  
19 Obama vote. And, of course, it's not hard to see. That's  
20 common sense.

21           Of course, there's going to be some number of  
22 Republican African-American voters who are going to say this is  
23 my first opportunity to vote, and there's going to be some  
24 population of them that is going to cross over to vote. That  
25 makes sense.

1 JUDGE OSTEEEN: That's true with white and black  
2 Democratic voters.

3 MR. HAMILTON: Absolutely true, which is another way  
4 of saying that race matters in an election. I don't think that  
5 was disputed. I don't think Dr. Hofeller disputes that.  
6 Frankly, I don't think defendants dispute that, and the  
7 evidence that they put in this morning was that there's still  
8 racially polarized voting in the state of North Carolina, and I  
9 don't disagree that there is in places but not in sufficient  
10 numbers in this -- in these two districts to defeat the  
11 African-American community's ability to elect the candidate of  
12 choice.

13 So the question is, in drawing these districts, did  
14 the legislature ask the right question under the *Alabama*  
15 analysis? And I would submit that they did not in either of  
16 these two districts. CD 1 is just easy. It's a flat numerical  
17 target. There was no narrow tailoring. There was no effort at  
18 narrow tailoring. Now, I'm not casting aspersions on what the  
19 General Assembly did. They were advised by their lawyers that,  
20 in their reading of *Strickland*, it required the creation of a  
21 50-percent-plus-one district. I think that is a patently  
22 improper and erroneous construction of what the three judges  
23 who signed the majority --

24 JUDGE OSTEEEN: *Strickland* doesn't allow a Court --  
25 you may disagree with this -- doesn't allow a Court to fashion

1 a remedy. *Gingles*, whatever the pronunciation is, if that  
2 issue exists, then *Strickland* does stand for the proposition  
3 that we, the Supreme Court, are going to require a majority  
4 minority district, and we're not going to allow you -- or we're  
5 not going to permit a crossover district to be substituted for  
6 that. It's too hard to analyze.

7 MR. HAMILTON: Sure, but remember, in *Strickland*, the  
8 plurality opinion went out of its way to say, you know, in a  
9 district where there's majority -- where there's white voters  
10 crossing over and voting with black voters, we can't imagine  
11 how you could establish the *Gingles* factors. It just doesn't  
12 make any sense, and then they express -- they kind of scratch  
13 their head and say -- of course, in this case, for some reason,  
14 it's undisclosed in the record. The parties stipulated to  
15 that. So it's a very odd factual record before the Court.

16 JUDGE OSTEN: Would you agree that under the  
17 language of *Strickland*, for *Strickland* to apply, there first  
18 has to be a wrong as established by the *Gingles* factors?

19 MR. HAMILTON: Absolutely, absolutely. And an  
20 important -- the factor that I'm afraid has not been really  
21 brought out well in the briefing, the remedy has to match the  
22 violation for Section 2. So you can't say there's racially  
23 polarized voting in this part of the district, so we're going  
24 to create an African-American district in that part, and this  
25 case is an excellent example of that.

1           Durham County -- I asked the questions today. The  
2 point of asking those questions is Durham County -- and *Gingles*  
3 itself said there's no evidence of racially polarized voting in  
4 *Gingles* [sic] County, and on the guise of creating a Section 2  
5 district in CD 1, they carved up Durham County and took out the  
6 African-American piece. Why? I mean, on what theory could  
7 that possibly be something commanded by the Voting Rights Act  
8 when there's no racially polarized voting? How do we know  
9 that? Because of *Gingles*.

10           JUDGE OSTEN: How do you -- in contending there's no  
11 racially polarized voting, and I understand you didn't have --  
12 nobody had the study done, but G.K. Butterfield testified about  
13 the "east of 95" effect, and, frankly -- I'm not saying  
14 ultimately what I would find, but let's assume for a second  
15 that his testimony was such as to assign great weight to it.  
16 If you move CD 1 around to the east, as was done, how does --  
17 how do those pieces -- I guess the ultimate question is how do  
18 we weigh or how should I weigh Butterfield's testimony with  
19 respect to the polarized voting that still exists east of 95?

20           MR. HAMILTON: Well, I don't think there's any  
21 dispute about that, about the fact that in some areas there's  
22 polarized voting, but you can see -- I don't have the tables up  
23 here, but the election tables, I think, are really -- and part  
24 of the reason we blew them up like this is I think they're  
25 really telling. You have minority-minority districts. So that

1 is black voting-age population of less than 50 percent and a  
2 consistent string, not just some of the time, all of the time  
3 where, you know, right down the line, every single time,  
4 they're voting. I mean, that's happening -- it's not to say  
5 that there's no polarized voting. There certainly might be in  
6 pockets, and there probably is in almost every state in this  
7 union, but the question -- that's not the question.

8           The question is as -- again, I'm sorry to keep  
9 referring to the *Alabama* case, but the right question is  
10 what -- at what level do we need to have black voting-age  
11 population in order to ensure that the minority community has  
12 the ability to elect? The DOJ guidelines on retrogression  
13 speak exactly to that same question.

14           So, yes, there may be some polarized voting, but  
15 unless it's sufficient to defeat the minority communities'  
16 ability to elect the candidate of their choice, it's background  
17 noise. It affects certainly where you have to draw the line to  
18 prevent retrogression, but it doesn't -- it doesn't mean that  
19 you don't have a Section 2 issue.

20           And so, you know, here, the districts that were  
21 created that were in the 46, 47 percent black voting-age  
22 population were terrific examples of an application of the  
23 Voting Rights Act that worked. They were -- they were examples  
24 that we should all be applauding at the behavior of the voters  
25 in those districts, and that's the problem here is that the



1 legislature took those and dismantled them on a theory and, I  
2 would submit, a misreading of the decision in *Bartlett v.*  
3 *Strickland*, that on their theory would require raising --  
4 significantly raising the black voting-age population. That's  
5 not what the Voting Rights Act -- that's not what the Voting  
6 Rights Act requires at all.

7           Now, I'd like to talk just a couple minutes on narrow  
8 tailoring. Obviously, because the defendants have not even  
9 tried to defend CD 12 as a Voting Rights Act district, as they  
10 call it, they haven't even attempted to show any kind of narrow  
11 tailoring. So that -- we just put that aside at the outset.  
12 They waived whatever defense they might have had, and there's  
13 no argument there.

14           As to CD 1, there was no effort at narrow tailoring.  
15 Their argument is almost even weaker in CD 1 because of the use  
16 of a flat numerical threshold. Narrow tailoring would be,  
17 well, we're going to do a racially polarized voting analysis  
18 and determine, gee, you only need to have a 46 percent black  
19 voting-age -- maybe it's a 40 percent. Maybe it's a  
20 47 percent, whatever it is. You know, if the legislature had  
21 done that and used that as the basis for drawing these  
22 districts, absolutely fine. That's what's called a strong  
23 basis in evidence for drawing these districts, but they didn't.  
24 Instead, they used this misinterpretation of *Strickland* and  
25 applied a 50 percent BVAP rule. That's been condemned by

1 Alabama. That was the problem in the *Page* --

2 JUDGE OSTEEEN: Isn't the 50 percent plus one just a  
3 majority minority number as established by the cases?

4 MR. HAMILTON: It is. Well, it is a majority  
5 minority number, absolutely, but it is not, in fact, what was  
6 required.

7 Your Honor, I have about five minutes left. I would  
8 like to save it for rebuttal, if I might?

9 JUDGE OSTEEEN: Actually, that will give you about six  
10 minutes in rebuttal, by my count.

11 MR. HAMILTON: Thank you.

12 JUDGE OSTEEEN: All right. Mr. Farr? Hold on just a  
13 second. Mr. Farr?

14 MR. FARR: Your Honor, we filed our brief. You've  
15 heard the evidence. I think the Court knows most of what our  
16 arguments are in this case. I think you understand that we  
17 contend that the 12th Congressional District was a political  
18 draw. It was based upon the Obama/McCain election and was also  
19 based upon how that district affected the surrounding  
20 districts.

21 I want to focus on the 1st District because I really  
22 need to clear up a few things that don't seem to be clear.

23 JUDGE GREGORY: I wanted to ask you about the 12th  
24 District if you are moving to the 1st.

25 MR. FARR: Okay, sir.

1 JUDGE GREGORY: Unless you will get back to the 12th?

2 MR. FARR: No, Your Honor, please, go ahead.

3 JUDGE GREGORY: Counsel, we agree that is direct  
4 evidence we have as to the intent as to the statements that  
5 your clients made in the record. You don't agree that's  
6 direct?

7 MR. FARR: No, sir, I sure don't, Your Honor. What  
8 happened was --

9 JUDGE GREGORY: It says, "Because of the presence of  
10 Guilford County in the 12th District, we have drawn our  
11 proposed 12th District..." They didn't limit it to Guilford  
12 County. They said, "We have drawn our proposed 12th District  
13 at -- and that's a key word, that preposition 'at' -- a black  
14 voting-age level that is above the percentage of black  
15 voting-age population found in the current 12th."

16 It didn't say because -- as a result of what we have  
17 drawn resulted in that level. It said, no, it was drawn at a  
18 black voting-age level, which means it established a floor,  
19 which was the existing BVAP for that county. Is that not --  
20 how is that not correct?

21 MR. FARR: Your Honor, with all due respect, I don't  
22 agree with your interpretation --

23 JUDGE GREGORY: I didn't ask you to agree with my  
24 interpretation. I asked if you agree with English, the  
25 language.

1 MR. FARR: The statement speaks for itself, Your  
2 Honor.

3 JUDGE GREGORY: I'm asking you how is that not direct  
4 evidence when the person -- the only two people responsible for  
5 drawing this plan said that's what they did.

6 MR. FARR: Because, Your Honor, we believe that what  
7 they were saying in that statement is after they based the  
8 district on political data, the maps came out, and I hope this  
9 is clear to the Court. There's a map notebook. I think it's  
10 Exhibit 25. These are all the maps that were available to the  
11 General Assembly before the plans were enacted, and those  
12 maps -- when someone proposes a plan, they have the racial  
13 statistics as part of the stat pack. So once the district was  
14 drawn and it turned out that the black population was above the  
15 prior district, that at the time was an argument to argue for  
16 the preclearance of the plan.

17 So, Your Honor, I understand what the statement says.  
18 I'm not going to argue with you about that, but we believe that  
19 that statement was made not as a cause -- reflecting a cause of  
20 the drawing of the district, but that was a result of what  
21 happened --

22 JUDGE GREGORY: Fair enough, counsel, but does that  
23 change it from being direct evidence? That's your spin, your  
24 argument, but that doesn't change whether it's direct evidence,  
25 does it?

1 MR. FARR: Well, Your Honor --

2 JUDGE GREGORY: Does it change whether it's direct  
3 evidence?

4 MR. FARR: I don't think it's direct evidence, Your  
5 Honor.

6 JUDGE GREGORY: I didn't ask you do you think it is,  
7 but would it change whether it's direct evidence just because  
8 you have a different spin on it? It says what it says, doesn't  
9 it?

10 MR. FARR: It says what it says, Your Honor, and we  
11 don't agree that that's direct evidence of intent.

12 JUDGE GREGORY: All right. So we can't believe what  
13 they said? You didn't put them on today, right?

14 MR. FARR: They testified in the other case, Your  
15 Honor.

16 JUDGE GREGORY: Well, we had a trial here for us to  
17 hear. You didn't want us to hear it?

18 MR. FARR: Your Honor, I was -- it was our  
19 understanding that we were running out of time.

20 JUDGE GREGORY: No, I didn't hear anybody --

21 MR. FARR: Also, Your Honor --

22 JUDGE GREGORY: No one cut you off.

23 MR. FARR: I would say the plaintiffs had them on  
24 their call list, and they didn't call them as plaintiffs either  
25 as witnesses.

1 JUDGE OSTEEEN: Let me ask a followup question to what  
2 Judge Gregory is saying, and that is the last sentence of that  
3 quote. There was clearly from Dr. Hofeller some instruction,  
4 depending on how it's construed, about compliance with  
5 Section 2 and Section 5, and that was an objective maybe with  
6 respect to CD 1, maybe with the overall plan. And the last  
7 sentence says, "We believe that this measure will ensure  
8 preclearance of the plan."

9 If your objective is concern over preclearance with  
10 the Department of Justice, does that last sentence also or --  
11 no, we won't say also. Does that last sentence suggest that  
12 there was a minimum and we wanted to ensure that District 12  
13 either remained at or above the prior black voting-age  
14 population?

15 MR. FARR: Your Honor, certainly preclearance was an  
16 issue in that district because Guilford County was in the  
17 district. It's our position that the district was drawn based  
18 upon political data; that once the district was drawn and the  
19 statistics came out, the reality that the black population had  
20 gone up in the district was an argument to be made to support  
21 the preclearance of the plan.

22 JUDGE GREGORY: So you got lucky. You'd have the  
23 Court believe that it was out of luck. You said, well, we drew  
24 a totally blind race. It was political, but it just so  
25 happened that it worked. Now it becomes just an argument but

1 not an intent from the beginning. Is that your argument?

2 MR. FARR: I don't think I'd put it that way, Your  
3 Honor --

4 JUDGE GREGORY: You didn't put it that way, but  
5 that's the natural extension of your argument, isn't it?

6 MR. FARR: I don't think so, Your Honor.

7 JUDGE GREGORY: Counsel, you said that -- didn't you  
8 say that it turned out once we finished, we looked at the map  
9 and said, oh, look it comes out to be at this amount, but we  
10 had no idea where it would come out. Isn't that the natural --  
11 it's just a post hoc argument but not any pre-intention at all,  
12 right? That's what you're arguing?

13 MR. FARR: Your Honor, I'm not sure I understand your  
14 question, Your Honor.

15 JUDGE GREGORY: You understand it. You just don't  
16 want to answer it.

17 What I'm saying is that you said that you had no  
18 intent at all looking at race, it was only political, and this  
19 statement said it was drawn "at". "At" is a very important  
20 preposition. It didn't say "resulted in." It said it was  
21 drawn "at." "At" refers to the antecedent of drawn, at a  
22 voting-age level, not -- it's not what -- it's not that it  
23 serendipitously ends up being so, but drawn at a level. I  
24 mean, I don't know how you get away from the English. I mean,  
25 that's King's English in terms of how you read statutes all the

1 time and reading a statement that's a very important statement  
2 here, and you're saying this was only just really the luck of  
3 the draw that it happened.

4 MR. FARR: Your Honor, I think that, as the Supreme  
5 Court noted in the *Cromartie* case, there's a very high  
6 correlation between blacks and people who vote for Democrats.  
7 So by increasing the Democratic strength in that district, it  
8 was not surprising that the black voting-age population went  
9 up, but it was a result of the political criteria that was used  
10 to draw the district.

11 JUDGE GREGORY: And you use the election of President  
12 Obama, but not the election -- the results that happened on the  
13 same day, the very same day, for other candidates, correct?

14 MR. FARR: Well, that's because, Your Honor, that was  
15 the first presidential race since '76 where a Democratic  
16 candidate had carried the state except for when President  
17 Clinton won, I believe, in '96, and it was a good test for  
18 Democratic strength. It was a good test for Democratic  
19 turnout. If the intent of the map drawer was to draw strong  
20 Republican districts, that would be the best race to look at.  
21 And also, Your Honor, as Dr. Hofeller testified, he checked the  
22 Obama race with other races, and they tracked -- if we had used  
23 the other races, the results would have been the same.

24 Now, could I move to Congressional District 1 for a  
25 second?



1 JUDGE GREGORY: I'm good.

2 MR. FARR: All right. Thank you, Your Honor.

3 I just wanted to say a couple things about  
4 Congressional District 1. Of course, we do not think that race  
5 was the predominant motive for Congressional District 1. There  
6 were lots of other factors that went into it. But I do want to  
7 talk about the evidence as it relates to Congressional  
8 District 1 if the Court found that race was the predominant  
9 motive.

10 JUDGE OSTEEEN: There's really no dispute in terms of  
11 the instructions to Dr. Hofeller that CD 1 was to be drawn at  
12 50 percent plus one.

13 MR. FARR: That's right, Your Honor, but we think if  
14 you read the *Cromartie* case, the pretty predominant motive,  
15 particularly when there's a high correlation between black  
16 voters and voting for Democrats, it's a very demanding burden,  
17 and you have to show that the race -- that the district is  
18 unexplainable but for race; and we've explained other criteria  
19 that were considered in drawing that district, including the  
20 severe underpopulation issue, which was the reason why it was  
21 drawn into Durham.

22 Also, drawing the district into Durham allowed the  
23 General Assembly to create Congressional District 4 as a very  
24 strong Democratic district, and the first Congressional  
25 District was also based largely on the prior 1st Congressional

1 District. So there were other traditional criteria that went  
2 into the consideration of the 1st Congressional District.

3 In *Vera v. Bush*, the Supreme Court said that you  
4 don't prove racial predominance just because race was a factor  
5 in drawing a district. We don't dispute that it was a factor  
6 in drawing the 1st Congressional District, but we don't think  
7 it was the predominant factor.

8 JUDGE OSTEN: All right.

9 MR. FARR: Now, if the Court finds that it was the  
10 predominant factor, I want to talk about the *Alabama* case.

11 The *Alabama* case was a Section 5 case. It wasn't a  
12 Section 2 case. The mechanical formula that the State adopted  
13 was a rule that they came up with, no precedent from the  
14 Supreme Court, that they were going to keep all their districts  
15 at their prior percentages of black population, including  
16 districts that were drawn at 70 percent, 65 percent, very, very  
17 high percentages of black population that we don't have here.  
18 That was the mechanical rule that the Supreme Court disagreed  
19 with in the *Alabama* case in the context of Section 5.

20 North Carolina followed a rule that was established  
21 by the US Supreme Court in *Strickland*. North Carolina did not  
22 come up with the 50-percent-plus-one rule. The US Supreme  
23 Court did.

24 And turning back to *Alabama*, Your Honor, what the  
25 *Alabama* Court said, which we think helps us, is that it's not

1 the State's obligation to prove a Section 2 violation. They  
2 have to show there was good reason to think that there might be  
3 a Section 2 violation, even if a Court might subsequently find  
4 that there wasn't sufficient evidence to find a Section 2  
5 violation.

6 JUDGE OSTEN: Okay. And I -- do you agree with what  
7 I asked earlier in terms of *Strickland* discussing the remedy,  
8 but also saying you only get to this remedy when there is a  
9 violation, and the factors to establish a violation are those  
10 set forth in *Gingles*?

11 MR. FARR: Exactly right, Your Honor, and our  
12 position is if those factors aren't present, then there  
13 shouldn't be a 47 percent district drawn in Northeastern North  
14 Carolina.

15 JUDGE OSTEN: All right. So then the other --

16 MR. FARR: It should go away.

17 JUDGE OSTEN: In terms of intent and direct  
18 evidence, there's a lot of discussion -- or there is some  
19 evidence, shall we say, that this map was drawn to comply with  
20 *Strickland* which suggests that it was drawn to create a  
21 majority minority district.

22 I don't know that I've seen anything to suggest that  
23 the legislature first analyzed the *Gingles* factors to ensure  
24 that there was a problem that needed to be remedied under  
25 *Gingles*.

1           MR. FARR: Well, thanks for asking that question,  
2 Your Honor, because that's a good thing to clear up right now.  
3 In fact, the legislature did that.

4           First of all, you had the historical precedent of the  
5 district being drawn as a voting rights district, and there's  
6 two types of districts that are pertinent here. One is a  
7 majority-black district and the other would be a majority  
8 minority coalition district, where the non-Hispanic whites are  
9 in the minority in the district. The 1st District has always  
10 been drawn as a majority non-Hispanic white district. Whites  
11 have never been in the majority in the 1st District.

12           There's also something called a "crossover district."  
13 That's where whites are in the majority, and they cross over to  
14 support the black candidate of choice. It's never been a  
15 crossover district. So this district has been, in voting  
16 rights terms, a majority-black district beginning. It was a  
17 majority black district in total population in -- maybe even in  
18 '97, and in voting-age population it's always been a majority  
19 minority coalition district. It's never been a majority-white  
20 district.

21           JUDGE OSTEEEN: The third factor in *Gingles*, though,  
22 is the minority must be able to demonstrate that the white  
23 majority vote sufficiently as a bloc to enable it in the  
24 absence of special circumstances, usually to defeat the  
25 minority's preferred candidate.

1           MR. FARR: Thank you for that question, Your Honor.  
2 In fact, the General Assembly had two studies performed and two  
3 different experts, one submitted by the NAACP named Dr. Ray  
4 Block, I think his name was, and then the legislature hired  
5 someone named Tom Brunell. Both of them did polarization  
6 studies for all of the counties, including in the 1st  
7 Congressional District.

8           Mr. Block only looked at black/white races that had  
9 taken place from 2006 through 2010; and in doing that, he  
10 missed a couple of counties where there had not been a  
11 black/white race. So Dr. Brunell looked at racial polarization  
12 in all the counties in the northeast; and between Dr. Brunell  
13 and Dr. Block, both of those experts gave testimony that there  
14 was statistically significant racially polarized voting in all  
15 those counties in which the 1st District was finally enacted.

16           And the other evidence, Your Honor, that supports  
17 that is that counsel for the NAACP made a statement that there  
18 was very strong racially polarized voting in North Carolina.  
19 The NAACP, through the Southern Coalition for Social Justice,  
20 proposed a majority minority coalition district in the  
21 northeastern part of North Carolina as the 1st Congressional  
22 District. The Democratic leadership proposed a majority  
23 minority coalition district in that part of the state. Those  
24 two groups, plus the legislative Black Caucus, proposed  
25 legislative plans; and in all three of those legislative plans,

1 all three of those groups proposed majority-black or majority  
2 minority coalition districts in every county that's in the 1st  
3 Congressional District, including Durham.

4 Now, I do want to say something about Durham, Your  
5 Honor.

6 JUDGE OSTEN: I want to talk about G.K. Butterfield  
7 for a minute.

8 MR. FARR: Okay.

9 JUDGE OSTEN: There may be -- let's assume there is  
10 expert testimony out there. G.K. Butterfield -- Congressman  
11 Butterfield came into this Court and said with respect to CD 1,  
12 as it was presently constituted, he felt like, generally  
13 speaking -- I think it was a 70 -- maybe a 70, 75 percent of  
14 the white bloc would not cross over and vote for a black  
15 candidate, but he thought that with -- there was 20, 25, or 30  
16 percent who would, better than it had been in years past. So  
17 if I weigh Congressman Butterfield's testimony significantly,  
18 is that at odds with whatever the experts have said?

19 MR. FARR: Well, I think that was important  
20 testimony, Your Honor, and I think it's also important to note  
21 that, again, the district was underpopulated by over 97,000  
22 people. So Congressman Butterfield seems to think and  
23 testified that he thought there was still racially polarized  
24 voting in that part of the state that required an elevated  
25 percentage of black population for black voters to have an

1 equal opportunity to elect their candidate of choice. He  
2 didn't come in and say that we could use a 20 percent district,  
3 which is the black population in the state. It's about  
4 22 percent. He didn't advocate for that. He didn't advocate  
5 for a 35 percent district. He testified that -- I believe he  
6 said it needed to be at 47 percent in his opinion.

7 Well, here is what the *Strickland* --

8 JUDGE OSTEN: Didn't he say they could go maybe as  
9 low as 35 to 37 percent, but he would prefer to be in the mid  
10 40s?

11 MR. FARR: I thought he said 45 to 47, Your Honor. I  
12 thought he said 45 would be a difficult race, and 47 would be  
13 the preferred number is what he talked about.

14 So the question is what 97,000 voters do you put into  
15 the district to make sure that African-Americans have an equal  
16 opportunity to elect candidate of choice at 47 percent? How do  
17 you factor in the fact that Congressman Butterfield is an  
18 incumbent? He's very popular with all constituents.

19 One thing that has not come before the Court, the  
20 plaintiffs want to look at the voting percentages. We have  
21 evidence and the trial court in the *Dickson* case looked at  
22 evidence about what the actual vote differences were in these  
23 elections.

24 So, for example, I know in 2010, and I'm pretty sure  
25 there's another election for Congressman Butterfield where his

1 margin of victory was less than -- I mean, substantially less  
2 than 97,000 people, which is the amount of people that would  
3 have to be added to that district to bring it up to one person,  
4 one vote. And this goes directly to what Justice Kennedy wrote  
5 about in the *Strickland* case, and he said that if there's  
6 racially polarized voting, and if the *Gingles* factors are  
7 present -- and there's a question, Your Honor, really whether  
8 the *Gingles* factors are things like disparities in education  
9 and income and whatever. There is testimony in the record --  
10 ample testimony in the record that that still exists in the  
11 area of the 1st Congressional District, but there's a question  
12 about whether a legislature has to actually have that type of  
13 information. It's arguable that the legislature just needs to  
14 have the three *Gingles* preconditions, and -- which is blacks  
15 can be a majority in a single-member district or the black  
16 population is geographically compact, they're cohesive, and  
17 there's racially polarized voting.

18           So what *Strickland* said, Justice Kennedy, is that  
19 it's very difficult to decide exactly what the right type of  
20 voters that you need to bring in when you change a district.  
21 It's very hard to determine the impact of incumbency because  
22 certainly it's likely that Congressman Butterfield would do  
23 better in his district than a newcomer. I think the political  
24 science on that is indisputable.

25           So what the Court in *Strickland* said was that courts



1 and legislatures meet a judicially manageable standard, and  
2 that's -- that was the reason for the 50-percent-plus-one rule.

3 I mean, arguably, Your Honor, as you pointed out, if  
4 the 50 percent plus one is not needed, then the district goes  
5 away. Then we shouldn't even have to be talking about a  
6 47 percent district at that point in time. I don't think any  
7 witness in this case, either in the *Dickson* state court trial  
8 or this case, is advocating that we abolish a district in  
9 Northeastern North Carolina that has a significantly high  
10 percentage of black population.

11 In fact, Your Honor, again, all the districts that  
12 have been proposed, even in 2011, are majority minority  
13 coalition districts. They're not majority non-Hispanic white  
14 districts. I think you may recall the evidence that in -- at  
15 the time of the 2010 Census, the 1st Congressional District had  
16 over 50 percent registered -- over 50 percent of the registered  
17 voters were African-Americans.

18 So the question I would leave the Court with, Your  
19 Honor, is we think both of these districts are legal. We think  
20 Dr. Ansolabehere's use of registration statistics to try to  
21 prove intent in the 12th District has been already ruled out by  
22 the Supreme Court. We think the enacted 1st District complies  
23 with the *Strickland* case, the *Cromartie* case. We think it  
24 complies with the *Alabama* case because the *Alabama* case says we  
25 just have to have good reasons, a strong basis in the evidence.

1 We don't have to prove that an actual violation took place; but  
2 if the Court finds that there is a violation, what exactly is  
3 the criteria that we're supposed to follow?

4           In *Cromartie*, the plaintiffs have an obligation --  
5 even if they prove that race was the predominant motive for 12,  
6 they have an obligation in *Cromartie* of offering another map  
7 which shows how District 12 could be drawn without race being  
8 the predominant motive but still achieving the legitimate and  
9 political goals of the General Assembly. They've not offered  
10 such a map.

11           And in the 1st District, Your Honor, how is the State  
12 supposed to know what they should be doing in drawing the 1st  
13 District? What's the basis for drawing the district at 47 or  
14 48 percent black voting-age population. With a minority-white  
15 population, you're creating a majority minority coalition  
16 district. And in *Strickland*, there's a footnote and some text  
17 actually where the Court says that the Supreme Court's never  
18 recognized a majority minority coalition district as a proper  
19 remedy for a Section 2 violation.

20           So when you're looking at *Alabama* and you're looking  
21 at the 1st District -- if you're looking at the *Alabama* case,  
22 the Court there says North Carolina doesn't have to prove an  
23 actual violation. They have to have a strong basis in evidence  
24 to support the district, but they can accomplish that if they  
25 have good reason to think that a VRA district is required, and

1 they don't have to get the numbers exactly right.

2           North Carolina did not adopt a mechanical rule  
3 requiring super majority-black districts as was the case in  
4 *Alabama*. The VRA district in the northeast was drawn slightly  
5 above 50 percent, and we think the evidence shows there was  
6 more than good reason to do so.

7           We also think, Your Honor, the plaintiffs have not  
8 articulated why the State should be obligated to draw a  
9 majority minority coalition district instead of a  
10 majority-black district; and if the plaintiffs are correct that  
11 there's no racially polarized voting in the 1st District  
12 anymore, which I find it hard to believe that they think that,  
13 but if that's what the Court finds, then the remedy is that the  
14 1st District goes away. There would be no obligation on the  
15 part of the State to draw any district in the northeast with  
16 any elevated black population.

17           JUDGE COGBURN: If the defendants, though, believe  
18 that they needed to draw a majority minority district in the  
19 1st District, is it just coincidental that when they got to the  
20 12th District, they turned a 42 percent black population  
21 district into a majority minority district of over 50 percent?  
22 Is that just -- did they just get caught up in this -- in  
23 trying to create majority minority districts over in 1 and just  
24 got carried away in 12 and went from 42 to 50?

25           MR. FARR: Well, Your Honor, the answer to that

1 question is there's a very, very high correlation between black  
2 voters and voting for Democratic candidates. So if you --

3 JUDGE COGBURN: And that's the -- if you just went  
4 with that, if you just went with that, then you just might as  
5 well never worry about having any question about section  
6 factors. The argument is always going to be we didn't -- yes,  
7 there were -- there were lots of blacks that were moved, but we  
8 did it because they were Democrats, and there would never be a  
9 question about it because 90 percent of the time, based on what  
10 you're saying, the African-American voters would be  
11 Democratically registered.

12 MR. FARR: Well, that's true; they would be  
13 Democrats. So if you were going to make a stronger Democratic  
14 district in the 12th and you were going to make a stronger  
15 Republican district in the 8th and if you were going to take  
16 the 13th district out of Guilford County, it's very likely that  
17 in that part of the state the percentage of black population  
18 would go up because there's such a high correlation between  
19 black voters and the Democratic vote.

20 And I would point the Court out, Your Honor, to  
21 Justice Thomas' opinion in the *Cromartie* case, that's the first  
22 *Cromartie* case, where he says drawing a majority-black district  
23 does not establish a racial gerrymander when there's a high  
24 correlation between black voters and voting for Democrats where  
25 the legislature's intention is to draw a very strong Democratic

1 district.

2 Unless the Court has any other questions -- and I  
3 would just conclude by saying thank you, Judges, very much for  
4 putting up with us and being as cordial as you were. We  
5 appreciated it as much as the plaintiffs' counsel do. Thank  
6 you.

7 MR. HAMILTON: I would like to address a couple of  
8 things. First of all, *Alabama* was not a Section 5 or a  
9 Section 2 case. *Alabama* was a *Shaw* case based on the  
10 Fourteenth Amendment for race-based redistricting just like  
11 here, and the error in the -- identified by the Supreme Court  
12 in the *Shaw* case was that the Court asked -- the legislature  
13 asked the wrong question, and what they should have asked was  
14 to what extent must we preserve existing minority percentages  
15 to maintain the ability to elect? That's the correct question,  
16 not how can we maintain existing levels, and that is exactly  
17 what was wrong in *Alabama*.

18 *Cromartie* was a circumstantial case. Sure, you have  
19 to -- and the discussion about putting in an alternative map is  
20 in a circumstantial case. In a direct evidence case, you don't  
21 need anything like that. We don't need to put in any  
22 circumstantial evidence or maps to show that it could have been  
23 drawn another way, because the fact of the matter is they told  
24 us what they were doing. They said they were drawing the  
25 districts based on race.

1           If the Fourteenth Amendment means anything, it means  
2 that is a suspect use of race, and we're into strict  
3 scrutinyville; and application of the strict scrutiny test  
4 requires narrow tailoring of the sort that in neither  
5 district -- they didn't even attempt it in CD 12, and in CD 1,  
6 because of the misinterpretation of *Strickland*, they didn't  
7 believe that they were entitled to.

8           JUDGE COGBURN: We have to find, though, that it was  
9 done -- that it was unexplainable other than by race, and  
10 the -- with regard to 12 -- I mean, the way 12 was originally  
11 drawn, did that not create a situation where when someone is  
12 trying to do it -- to go to a political advantage, they're  
13 going to wind up having to switch African-American voters in  
14 and out of that district in order to do that?

15           MR. HAMILTON: Sure, they could have, but I submit  
16 there's a couple of problems here. The first is, again, the  
17 quote we put up here, and I think that it was the subject of a  
18 couple of questions from the Court earlier, that they moved --  
19 in CD 12, the proposed -- you know, proposed political  
20 gerrymander, they actually moved people because of their race,  
21 a substantial African-American population, and they said they  
22 did. That's just direct evidence, and I completely agree with  
23 the questions from the Court.

24           Now, *Bartlett v. Strickland* actually said, quote:  
25 It's difficult to see how the majority bloc voting requirement

1 could be met in a district where, by definition, white voters  
2 joined in sufficient numbers with minority voters to elect the  
3 minority's preferred candidate. That's at page 1224. And, in  
4 addition, said: In areas with substantial crossover voting, it  
5 is unlikely that the plaintiffs would be able to establish the  
6 third *Gingles* precondition, bloc voting by majority voters.  
7 That's page 1248.

8           And I think, Your Honor, you asked a moment ago, I  
9 don't see any evidence in the record that the legislature did  
10 any kind of *Gingles* analysis. That's exactly right, Your  
11 Honor, because they didn't. They didn't analyze any of this  
12 stuff. Yes, there were polarized --

13           JUDGE OSTEN: Let me ask you about this total  
14 percentage on the charts, the 500 and 501 chart.

15           MR. HAMILTON: Yes.

16           JUDGE OSTEN: You've got a total black voting-age  
17 population, let's say, for example, 47 percent. Then we have a  
18 margin of victory of 66 percent, but at least with respect to  
19 the chart, there's nothing in there, as Dr. Hofeller pointed  
20 out, to explain what the turnout was so you have some idea how  
21 that percentage victory compares to the composition of the  
22 district.

23           MR. HAMILTON: Sure.

24           JUDGE OSTEN: So how do you walk us through the  
25 coalition or crossover to get to the point where you can

1 conclude, as was suggested, I think, that there is a 20 percent  
2 crossover or some percentage crossover?

3 MR. HAMILTON: Well, let's think -- number one, we  
4 know as a matter of fact that the black voting-age population  
5 was below 50 percent. So however -- and we know a second fact,  
6 that is, the outcome of the election, the African-American  
7 preferred candidate one. So it wouldn't matter -- turnout  
8 doesn't matter because every single African-American voter  
9 could turn out and vote for the African-American preferred  
10 candidate, and they would still lose if there was --

11 JUDGE COGBURN: Not if they were the only people --

12 JUDGE OSTEN: You're assuming --

13 MR. HAMILTON: Fair enough.

14 JUDGE OSTEN: You're assuming it's 100 percent  
15 turnout to match the stats up, but we don't know that that's  
16 the case. So without a breakdown -- assume the 47 percent  
17 equals 50,000 voters. Well, it may have been 50,000 plus -- or  
18 not plus. That 50,000 comprises 60 percent of the winning  
19 margin. That's an extreme, and I'm not suggesting how it  
20 happened, but that's -- statistically speaking, when we talk  
21 about crossover, I can't -- I'm -- again, walk me through how I  
22 reach that conclusion from what we've got in front of us.

23 MR. HAMILTON: There's no evidence that's been  
24 offered by defendants that the turnout rates differ between  
25 African-American voters and white voters or other minority



1 voters. There's simply no evidence in the record. So the only  
2 thing the Court can conclude is that they turn out in equal  
3 numbers, and so assuming, and --

4 JUDGE OSTEN: How can I assume that?

5 MR. HAMILTON: I'm sorry?

6 JUDGE OSTEN: How would I assume that?

7 MR. HAMILTON: Well, you have no evidence to suggest  
8 otherwise. You have registered voters that vote in the  
9 population, you've got the election results, and you know what  
10 the population statistics are for each of these districts.

11 JUDGE OSTEN: True.

12 MR. HAMILTON: So there's no -- there's no -- I mean,  
13 let's just back up one step in the analysis. One thing we  
14 know, and I think we would all probably agree, is that the  
15 African-American candidate of choice won for 20 years straight  
16 in these districts even when the black voting-age population  
17 was well below 50 percent. There was no need -- it's a  
18 functional analysis.

19 Remember the question that the Court said in *Alabama*.  
20 It's the right question. "To what extent must we preserve  
21 existing minority percentages to maintain the ability to  
22 elect?" That's the question that should have been asked, and  
23 that's the question that was not asked because of this  
24 interpretation of *Strickland* that somehow have to -- have to --  
25 regardless of the voter behavior in the district, you have to

1 increase the African-American black voting-age population,  
2 which has the effect of sorting voters by race. That is  
3 exactly what the Voting Rights Act does not mean.

4 JUDGE GREGORY: In response to that, that chart shows  
5 that either crossover voting occurs or either that it's not  
6 required for African-Americans to elect the preferred choice.

7 MR. HAMILTON: That's right. That's exactly right.  
8 And the question here is what -- you know, is did the General  
9 Assembly have a substantial basis in evidence? Did they have  
10 good reason to draw what they did? And the fact of the matter  
11 is they didn't because they didn't do a racially polarized  
12 voting analysis. They didn't analyze to what extent they  
13 needed -- they didn't do the functional analysis required to  
14 determine the question, as described by the Court either in  
15 *Alabama* or Department of Justice in the guidance.


16 So the Supreme Court in the *Miller* case wrote that  
17 the essence of the Equal Protection claim recognized in *Shaw* is  
18 that the State has used race as a basis for separating voters  
19 into districts. The *Shaw* Court condemned those redistricting  
20 plans because they "threatened to carry us further from the  
21 goal of the political system in which race no longer matters, a  
22 goal that the Fourteenth and Fifteenth Amendments embody and to  
23 which the Nation continues to aspire."

24 In this case, the General Assembly used race, not  
25 politics, as a predominant factor. They told us that they did

11           Plaintiffs respectfully ask this Court to invalidate  
12 these two districts and to implement appropriate, immediate,  
13 and effective remedies for the folks of this state. Thank you  
14 all.

17 (At 4:22 p.m., proceedings concluded.)

19 C E R T I F I C A T E

22   
23 Date: 10/20/2015 Joseph B. Armstrong, RMR, FCRR  
24 United States Court Reporter  
324 W. Market Street  
Greensboro, NC 27401